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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 68

PUGET SOUND STEVEDORING COMPANY,
APPELLANT,

vs.

THE TAX COMMISSION OF THE STATE OF
WASHINGTON ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF
WASHINGTON

FILED MAY 18, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

26324

No. 16407

PUGET SOUND STEVEDORING COMPANY, a Corporation,
Plaintiff,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of Said Commission, Defendants

COMPLAINT—Filed January 13, 1936

Comes now plaintiff and for cause of action against the defendants, complains and alleges as follows:

I

Plaintiff, Puget Sound Stevedoring Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington and has paid its annual license fee last due the State of Washington.

II

Defendants, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, constitute the Tax Commission of the State of Washington, whose principal office is in Olympia, Thurston County, Washington.

III

Plaintiff is engaged solely in the business of stevedoring or loading, discharging and handling of cargoes of vessels engaged exclusively in interstate or foreign commerce, or both. Said cargoes while so handled are at all times in continuous movement from the hold of a vessel to first place of rest, or vice versa. A more particular description of the nature and character of the plaintiff's business activities and of the stevedoring industry is attached hereto, marked Exhibits A and B, and made a part hereof.

IV

The defendants, acting as a board, with power to admin-[fol. 2] ister the tax laws of the State of Washington, have asserted and are asserting the right to impose upon plaintiff a tax or exercise for the privilege of engaging in its business activities, said tax or excise being commonly known as the Business and Occupation Tax, created by Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935.

V

The business activities of the plaintiff are within the exclusive jurisdiction and control of the United States of America. The above tax or excise if enforced against plaintiff is in direct violation of Article I, Section 8 of the Constitution of the United States of America in that said tax or excise imposes a burden, hindrance and obstruction upon interstate and foreign commerce and upon the free and steady flow and movement of the same.

VI

The imposition of the said tax or excise upon the plaintiff for the privilege of engaging in its business activities in the State of Washington likewise constitutes a denial to plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment, to the Constitution of the United States, and Article I, Section 12, of the Constitution of the State of Washington, in that said tax or excise is threatened to be imposed upon the business activities of the plaintiff as a contracting stevedore, but same is not imposed upon a ship owner when doing its own stevedoring in lieu of employing the services of an independent contractor such as plaintiff.

VII

The imposition of the said tax or excise upon the plaintiff for the privilege of engaging in its business activities in the State of Washington is likewise a deprivation of plaintiff's property without due process of law, in violation of the [fol. 3] Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution

of the State of Washington, in that said tax or excise is arbitrary, unreasonable, excessive and confiscatory.

VIII

Plaintiff alleges that unless restrained and enjoined by this court the defendants, acting for and on behalf of the State of Washington in their capacity as the Tax Commission of the said State, will continue to assert against plaintiff the said tax or excise and will attempt to levy and collect the same, which action will result in a multiplicity of suits and an impairment of the credit of the plaintiff; that the provisions of the said laws in so far as they are applied to and affect plaintiff are wholly negative and void for the reasons hereinabove set forth; that threatened action of the defendants seeking to enforce the provisions of the said laws against the plaintiff is creating and will create a condition of uncertainty and jeopardy in the conduct of the business of the plaintiff, which substantially and materially affects same; that the said laws recognize and provide for an injunction or restraining order to issue to restrain and enjoin the collection of any tax or penalty imposed thereunder upon the ground that the assessment, levy and collection thereof is in violation of the Constitution of the United States, or that of the State of Washington; that the defendants, constituting the Tax Commission of the State of Washington, are desirous of settling the dispute concerning the applicability of the said tax or excise to the business activities of the plaintiff, and to the business activities of many other stevedoring concerns in the State of Washington engaged in like activities, and that an early decision of the matters here presented is in the best interests of all concerned.

IX

By reason of the facts herein alleged plaintiff has no plain, speedy, or adequate remedy at law.

[fol. 4] WHEREFORE plaintiff prays judgment and decree of this court, as follows:

1. That defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and their agents, servants and employees, be forever enjoined and restrained from enforc-

ing, as against this plaintiff, the said Business and Occupation Tax, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

2. That, pending the determination of this suit, the defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, be required to show cause, on a day certain to be fixed by this court, why a temporary injunction should not issue against defendants and each of them, individually and as the Tax Commission of the State of Washington, and any associate commissioner, and against their agents, servants and employees, restraining and enjoining them from enforcing, as against this plaintiff, the said Business and Occupation Tax, or any portion thereof, from claiming taxes thereunder as due or to become due from plaintiff, from imposing any penalty on plaintiff, and from attempting, directly or indirectly, to collect any tax thereunder from plaintiff.

3. That plaintiff do have and recover its costs and disbursements herein.

4. That plaintiff have such other and further relief as to the court may seem just and proper.

Grosscup, Morrow & Ambler, Attorneys for Plaintiff, 910 Republic Building, Seattle, Washington.

[fol. 5] *Duly sworn to by W. P. Alvick. Jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO COMPLAINT

The Puget Sound Stevedoring Company is a Washington corporation with headquarters at Seattle, Washington. It has been engaged for some years past and is now engaged in the general stevedoring business at Seattle and other ports on Puget Sound. It conducts its business in one of three methods:

First. Under contract with a shipowner or ship master to load or discharge a vessel at a specified rate per ton of cargo

handled or discharged, the rate varying with the commodity so handled. The stevedoring company here employs individual longshoremen, over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master.

Second. Under contract with the shipowner or ship master to load or discharge a vessel on a cost-plus insurance (employer's liability—workmen's compensation—public liability), plus commission basis. The stevedoring company here employs individual longshoremen, over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master. This method differs from "First" above only in the fact that the method of compensation paid is different.

Third. Here the Puget Sound Stevedoring Company acts as labor agent for the shipowner or ship master, supplying him with longshoremen to load and discharge the vessel. The stevedoring company here does not control or direct the operation of the individual longshoremen over whom the ship's officers assume complete supervision and direction. The stevedoring company merely collects the longshoremen and supplies them to the vessel and at the completion of their work advances the pay roll to pay them off, later billing the ship and her owner the amount of the pay-roll plus a commission for services. The pay-roll signed by the longshoremen, under the last method, contains the following clause:

"Received from the Master and Owners of the Steamer —— through the Puget Sound Stevedoring Company, as Master's representative, the sum set opposite our name in full and complete satisfaction for any and all services ren- [fol. 7] dered to such steamer, and the said steamer, master, owners and Puget Sound Stevedoring Company are hereby released from any and all further claims and demands."

The vessel usually furnishes to the stevedoring company winches, steam for the winches, booms, cargo falls, and other deck appliances. The stevedoring company usually supplies the slings, trucks, and other such cargo handling equipment. All cargo loaded or discharged by the Puget Sound Stevedoring Company is moving in interstate or foreign commerce, or both, being enroute to or from an interstate or

foreign point. While it performs stevedoring services for vessels under United States documentation engaged in the foreign, coastwise, and intercoastal trade, the bulk of its work is handling cargo received from or destined to vessels flying foreign flags.

Some vessel owners instead of employing a stevedoring company to load and discharge their vessels employ longshoremen as their direct employees to perform the necessary stevedoring for their ships. The nature of the services performed is identical, whether performed by longshoremen as employees of the vessel, or whether performed by contract between a stevedoring company and the vessel.

Attached to this statement, marked Exhibit B, is a copy of the agreement now existing between employers and employees engaged in the Stevedoring Industry in this state effective May 2, 1935. This pamphlet, with slight changes unimportant in this discussion, contains definitions and describes in some detail the character of the industry. It is a codification of this industry as it has existed and has been recognized in this state for many years.

As set forth in Exhibit B, the general method of stevedoring a vessel in the State of Washington and that employed by the plaintiff, Puget Sound Stevedoring Company, is as follows:

Each hold of the vessel is worked by a crew of men who are commonly called a "gang". The gang in general consists of the following:

1. Six men in the hold of the ship.

2. One or two winchdrivers depending upon whether the vessel is equipped with double or single winches.

[fol. 8] 3. A hatch tender or straw boss, who supervises the work of the gang.

4. Two sling-up men on the dock.

The men in the hold place the cargo upon a sling which is hoisted by the ship's gear from the hold, swung over the deck and lowered to the dock. There the ship's gear is disengaged and the load hauled away.

In loading a vessel the same method is employed as that outlined above, save in the reverse order. The cargo is delivered at the ship's side on a sling, which is attached by the sling-up men to the ship's tackle and then hoisted over

the side and lowered into the hold, where it is stowed by the hold men.

As set forth in Exhibit B, a longshoreman handles the cargo from the hold of the vessel until it has reached what is termed the "first place of rest", and vice versa. Cargo handled through side ports moves by truck from the hold through the side ports to the "first place of rest".

By the term "first place of rest", is meant the point to which, and the point from which, the cargo moves continuously from or to the hold of the ship. As soon as the continuity of movement ceases, the handling of the cargo ceases to be "longshoring", and becomes "dock work". The rate received by the individual workman likewise changes. For longshoring the workman receives normally 95¢ an hour; for dock work, 85¢ an hour.

Whether a stevedoring company begins and ends its services at the ship's sling, or at the "first place of rest", depends upon its arrangement with the vessel. If, however, the stevedoring company's services begin or end at the ship's sling, then the dock company must perform the stevedoring services between the "first place of rest" and the sling, employing longshoremen to do this work.

Except in very rare instances, not here involved, the water carrier's bill of lading imposes upon the vessel the obligation of accepting cargo alongside at ship's tackle and of [fol. 9] placing it aboard the vessel and stowing it. Likewise at destination the vessel assumes the obligation of discharging cargo and delivering it alongside at ship's tackle. In such case the carrier absorbs in its freight rate all expenses in connection with the handling of the cargo between the hold of the vessel and the reach of ship's tackle.

In some trades, the vessel also absorbs handling charges to the "first place of rest" from ship's tackle, and vice versa. In the event the carrier does not absorb such handling charges, they are billed to the shipper or consignee as an extra charge. Whether absorbed by the vessel in its freight rate or paid for as an extra charge, and whether performed by a stevedoring company or by a dock company, stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest", and vice versa.

Under current dock tariffs in this state, cargo upon discharge is allowed to remain on a dock for a number of days,

depending on the port and on the trade, without payment of any additional charge. At the expiration of this free time, a charge is made which may be considered in the nature of wharf demurrage.

The nature of stevedoring services are the same whether the origin or destination of the cargo is at the port where performed or at some interior point.

In some trades, the crew of the vessel still performs the stevedoring services, as the crew exclusively performed them in earlier days. But this is now quite rare due to a variety of causes, probably the most important reasons for the change being—

(a) Larger vessels, and smaller crews.

(b) Short stays in ports, as a result of faster schedules.

(c) The presence of competent, experienced and reliable longshoremen at all times in every port in sufficient numbers to afford quick dispatch of the vessel.

[fol. 10] The result has been that every seaport demands the services of experienced longshoremen sufficiently elastic in number to serve the normal and even peak demands of its waterborne trade. Any interruption in the service of such cargo handlers cripples the activities and business of a port and the free and steady flow of commerce and trade through the port is sharply and abruptly slowed, hindered and obstructed.

Longshore payrolls represent seventy to eighty per cent of the total invoice of a contract stevedore. Stevedoring charges (in and out) represent approximately one-fourth to one-third of the freight revenue earned by the vessel.

[File endorsement omitted.]

[fol. 11] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

ANSWER—Filed March 19, 1936

Come now defendants in the above entitled action appearing on behalf of the state of Washington and for an answer to plaintiff's complaint admit, allege and deny:

I

Admit the allegations contained in paragraphs 1 and 2 thereof.

II

Admit that plaintiff is engaged in business in the state of Washington as an independent contractor and that the nature of work performed by plaintiff under contract is as described in exhibit "A" attached to plaintiff's complaint and made a part thereof by reference in paragraph 3.

III

Answering paragraphs 4 and 8 thereof these defendants admit that plaintiff is taxable with respect to the business of furnishing services under contract under the provisions of the business and occupation tax and admit that the tax will be collected by the ordinary process of law.

IV

Referring to paragraph 5 thereof defendants deny that the business activities of plaintiff are within the exclusive [fol. 12] jurisdiction and control of the United States of America and deny that the enforcement of the tax is in violation of article 1, section 8 of the constitution of the United States as a burden upon interstate or foreign commerce.

V

Referring to paragraph 6 thereof defendants deny that the imposition of the said business tax upon plaintiff constitutes a denial to plaintiff of the equal protection of the laws or is in violation either of the 14th Amendment to the constitution of the United States or article 1, section 12 of the constitution of the state of Washington.

VI

Referring to paragraph 7 thereof defendants deny that the said business tax or its imposition is either arbitrary, unreason-, excessive or confiscatory and denies that the imposition of said tax is a deprivation of property without due process of law.

VII

Defendants deny paragraph 9 thereof.

Wherefore having fully answered plaintiff's complaint defendants pray that the same be dismissed and that they have judgment for their costs.

G. W. Hamilton, Attorney. E. P. Donnelly, Assistant Attorney General.

[fol. 13] *Duly sworn to by E. P. Donnelly. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF THURSTON COUNTY

No. 16407

PUGET SOUND STEVEDORING COMPANY, a Corporation, Plaintiff,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner. Members of Said Commission, Defendants

JUDGMENT AND DECREE—Filed Aug. 3, 1936

This matter having heretofore come on regularly for hearing before the court, sitting without a jury, all parties being respresented by counsel and having respectively moved for judgment on the pleadings, the cause having been presented without testimony and the cause having been argued and the court having, on the 18th day of June, 1936, handed down its Memo Opinion directing that this action be dismissed; Now, therefore, it is by the court

Ordered, Adjudged and Decreed that this action be and the same is hereby dismissed with prejudice and with statutory costs. To all of which the plaintiff duly excepts and its exception is allowed.

Done in Open Court this 3rd day of August, 1936.

John M. Wilson, Judge.

Approved as to form. E. P. Donnelly, Asst. Atty. Genl.

[File endorsement omitted.]

[fol. 15] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed August 3, 1936

To the Tax Commission of the State of Washington, and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, members of said Commission, and to its and their attorneys, G. W. Hamilton, Attorney General, and E. P. Donnelly, Assistant Attorney General:

You and Each of You are hereby notified that Puget Sound Stevedoring Company, a corporation, the above named plaintiff, feeling itself aggrieved, has appealed and does hereby appeal to the Supreme Court of the State of Washington from the judgment and decree of the Superior Court of Thurston County, Washington, made and entered herein on the 3rd day of August, 1936, and from each and every part thereof.

Dated this 3rd day of August, 1936.

Grosscup, Morrow & Ambler, Attorneys for Plaintiff.

Service of the foregoing Notice of Appeal admitted and a copy thereof received this 3rd day of August, 1936.

W. A. Toner, Asst. Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 16] IN SUPREME COURT OF WASHINGTON

No. 26324

PUGET SOUND STEVEDORING COMPANY, a Corporation, Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of said Commission, Respondents

ASSIGNMENTS OF ERROR—Filed August 19, 1936

1. The trial court erred in holding that the appellant is an independent contractor.

2. The trial court erred in holding that the appellant is not engaged in Interstate and Foreign Commerce.

3. The trial court erred in holding that Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935, commonly known as the Business and Occupation Tax, contemplates or authorizes the imposition of a tax upon the operations of the appellant.

4. The trial court erred in holding that the imposition and collection from the appellant of the Business and Occupation Tax does not impose a burden, hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

5. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant, and not upon a ship owner when doing his own stevedoring, does not render the law discriminatory as being in violation of Article I, Section 12, of the Constitution of the State of Washington.

[fol. 17] 6. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant, and not upon a ship owner when doing his own stevedoring, does not deprive the plaintiff of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

7. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law in violation of Article I, Section 3, of the Constitution of the State of Washington.

8. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

9. The trial court erred in failing to hold that Chapter 191, Laws of Washington 1933, as amended by Chapter

57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935, commonly known as the Business and Occupation Tax, does not contemplate nor authorize the imposition of a tax upon the operations of the appellant.

10. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations is an unlawful and illegal burden, hindrance and obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3), of the Constitution of the United States.

11. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations, and not upon a ship owner doing his [fol. 18] own stevedoring, is discriminatory as being in violation of Article I, Section 12, of the Constitution of the State of Washington.

12. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations, and not upon a ship owner doing his own stevedoring, does not deprive the appellant of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States.

13. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax law upon the appellant deprives the appellant of its property without due process of law in violation of Article I, Section 3, of the Constitution of the State of Washington.

14. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax law upon appellant deprives the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

15. The trial court erred in dismissing the action and granting judgment in favor of the respondents.

16. The trial court erred in failing to find for the appellant, and in failing to grant judgment in its favor.

[File endorsement omitted.]

[fol. 19] IN SUPREME COURT OF WASHINGTON

[Title omitted]

STIPULATION RE FORM OF CONTRACT—Filed September 18, 1936

It is Hereby Stipulated by and between the above entitled parties through their respective counsel that this stipulation may be filed by the Clerk and considered by the Court as a part of the record on appeal in this case.

It is Further Stipulated that the form of contract attached to this stipulation is the standard form used by Puget Sound Stevedoring Company in connection with its business of loading and discharging vessels under the first and second methods described in Exhibit A, attached to and made a part of the complaint filed in this action.

Dated this 17th day of September, 1936.

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Respondents. Grosscup, Morrow & Ambler, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 20] EXHIBIT TO STIPULATION

Puget Sound Stevedoring Company, Inc.,

Seattle, Washington

Agreement made this date: —— —, 193-, between the —— ——, and the Puget Sound Stevedoring Co., Inc.

The Stevedoring Company Agrees:

(1) To discharge and/or load all cargoes of all vessels owned, controlled, chartered or managed by the Shipping Company at all ports in the Puget Sound district.

(2) To take delivery of cargo on wharf or lighter or in booms alongside ship at end of ship's tackle; or at mouth of chute or conveyor where such is used; and to deliver cargo on wharf or lighter alongside ship at end of ship's tackle.

(3) To carry out the work with all reasonable dispatch and in a careful manner to the satisfaction of the ship's officers and/or representatives of the Shipping Company.

(4) To observe and abide by the Longshore Labor agreements.

(5) In event of labor trouble to exercise its best efforts to forward the work, but is not to be held liable for loss to, or detention of, vessels of the Shipping Company; furthermore the rates quoted herein are not to apply, but special rates for the duration of the trouble shall be agreed upon.

(6) To provide satisfactory insurance: (a) Complying with the Federal and State Compensation Acts; (b) Protecting its liability to the Public; also (c) holding harmless the Shipping Company against any claim or action which may be brought by any employee of the Stevedoring Company for personal injury or death alleged to be sustained as a result of its stevedoring operations during the progress of the work on or around the Shipping Company's vessels, excepting where caused by fault of the Ship's officers, crew or equipment.

(7) To indemnify the shipping Company for all loss of cargo or damage to ship or cargo caused by its employees during the progress of the work, attention being called to and understanding had of such loss or damage at time of occurrence, except where caused by ship's officers, crew or equipment. The Stevedoring Company will not be responsible for cargo after same is landed on wharf, car or lighter alongside or before delivered to ship's sling.

The Shipping Company Agrees:

(8) To have the Stevedoring Company discharge and/or load all cargoes of all vessels owned, controlled, chartered or managed by the Shipping Company at all ports in the Puget Sound district.

(9) To provide a safe place for the Stevedoring Company employees.

(10) To furnish adequate deck appliances, winches in good order and with sufficient power, booms, blocks, falls, sufficient lights, etc.

(11) To pay in full in United States Currency within five days from date of bill at the attached contract rates which are a part of this contract.

(12) In event of increase in present longshore wages or changes in hours or working conditions, to allow an increase in present stevedore rates as determined by the Association of Washington Stevedores and the Shipping Interests jointly; in event of a decrease the Stevedoring Company will allow a decrease in rates similarly.

[fol. 21] (13) Work done under the following conditions is for ship's account, the Stevedoring Company to be reimbursed for its payroll cost plus insurance plus a management fee as specifically set forth:

(a) Special Work.—The attached contract rates are for handling cargo in regular holds only; in deep tanks, cross bunkers, ship's refrigerators, poops, peaks and in similar compartments, or for loading cargo on top of bulk wheat with less than six feet head room; Plus —%.

(b) Ship's Time.—Shifting or restowing cargo, shifting coal or dunnage, cleaning holds and any other ship's work including handling mails or baggage, rigging and unrigging special gear, handling lines, shifting scows, etc.; Plus —%.

(c) Minimum Cargo.—Cargo at any one port of less than 50 Tons or cargo in any one hold of less than 5 Tons may be handled on contract rates or at Plus 10%, at Stevedoring Company's option.

(d) "Explosives" or "Damaged Cargo" as defined in the Labor Agreement; Plus —%.

(e) Overtime.—For work performed during overtime, as defined in the Labor Agreement, the Stevedoring Company is to be reimbursed for the difference in straight and overtime; Plus —%.

(f) Waiting and Standby Time.—Payroll costs to be reimbursed to the Stevedoring Company by the Shipping Company.

(g) Transportation, Etc.—Expenses borne by the Stevedoring Company for Transportation, Travel Time, Sub-

sistence, Launch Hire, etc. in transferring longeshoremen when required, to be reimbursed by the Shipping Company.

(h) Hatch Tents.—When required by Ship—$7.50 per tent-day.

(1) Heavy Lifts:

5000	Lbs.	to	10000	Lbs.	.....	Each.
10001	"	"	15000	"	.....	"
15001	"	"	20000	"	.....	"
20001	"	"	30000	"	.....	"
30001	"	"	40000	"	.....	"
40001	"	"	60000	"	.....	"

Crane Hire for handling Heavy Lifts to be at ship's expense.

The foregoing mutual understanding and agreement shall bind for one year from date; and shall continue in force until terminated by either party on 30 days' written notice.

——, by —— ——.

Witness: —— ——.

Puget Sound Stevedoring Co., Inc., by —— ——.

Witness: —— ——.

[fol. 22] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed April 8, 1937

The court having considered appellant's petition, concurred in by various amici curiæ, for a rehearing herein, together with respondents' answer thereto;

It is Ordered that the petition be and it hereby is denied.

Dated this 7th day of April, 1937.

By the Court.

Wm. J. Steinert, Chief Justice.

[File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF WASHINGTON

No. 26324

Thurston County No. 16407

PUGET SOUND STEVEDORING COMPANY, a Corporation, Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and H H. HENNEFORD, et al., Members of Said Commission, Respondents

JUDGMENT—April 8, 1937

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 8 day of April, A. D. 1937, on motion of G. W. Hamilton, Attorney General Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said The Tax Commission of the State of Washington, et al have and recover of and from the said Puget Sound Stevedoring Company and from American Bonding Company of Baltimore, Surety, the costs of this action taxed and allowed at Seventy-two and 15/100 ($72.15) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Volume 33, page 345, of the records of the Supreme Court.

[fol. 24] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER OF SEVERANCE—Filed April 17, 1937

The motion of Puget Sound Stevedoring Company, a corporation, appellant in the above action, for an order of severance having come on for hearing and it appearing that a notice of summons and severance has been duly given to American Bonding Company of Baltimore, a Maryland corporation, and it further appearing that said American Bonding Company of Baltimore, a Maryland corporation, has duly consented in writing to the entry of the Order of Severance; Now, therefore, it is

Ordered, Adjudged and Decreed that American Bonding Company of Baltimore, a Maryland corporation, not appealing from the final judgment and decree of the Supreme Court of the State of Washington dated April 8, 1937, to the Supreme Court of the United States, said corporation is hereby severed from Appellant Puget Sound Stevedoring Company, a corporation, on its appeal to the Supreme Court of the United States from said judgment and decree of the Supreme Court of the State of Washington, and said American Bonding Company of Baltimore, a Maryland corporation, is hereby barred from ever thereafter appealing from said judgment and decree.

Done this 17th day of April, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

O. K. E. P. Donnelly, Asst. Atty. Genl.

[fol. 25] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 17, 1937

The petitioner and appellant assigns the following errors in the records and proceedings in this cause:

1. The Supreme Court of the State of Washington erred in failing to hold that the operations of the appellant in handling cargo in continuous movement in Interstate and Foreign Commerce from the hold of a vessel to first place of rest and vice versa form an essential and component part of and an essential link in Interstate and Foreign Commerce.

2. The Supreme Court of the State of Washington by its judgmnet erred in failing to hold that the appellant is engaged solely in Interstate and Foreign Commerce.

3. The Supreme Court of the State of Washington by its judgment erred in holding that appellant is not a necessary factor in Interstate and Foreign Commerce but merely renders an independent service of advantage to those actually forming a necessary and component part or link in such commerce.

4. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the Business and Occupation Tax (Chapter 191 Laws of Washington 1933, as amended by Chapter 57 Laws of Washington Extraordinary Session 1933 and Chapter 180 Laws of Washington 1935) upon its gross income does not impose a burden, [fol. 26] hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8, of the Constitution of the United States.

5. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition of said Business and Occupation Tax upon appellant, and not upon a ship-owner doing its own stevedoring, does not deprive the appellant of the equal protection of the laws in violation

of the Fourteenth Amendment to the Constitution of the United States.

6. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition of said Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of said Business and Occupation Tax upon appellant's gross income is an unlawful and illegal burden, hindrance and obstruction upon Interstate and Foreign Commerce, in violation of Article I, Section 8, of the Constitution of the United States.

8. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations and not upon a ship-owner doing its own stevedoring deprives the appellant of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

9. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the [fols. 27-40] Business and Occupation Tax upon the business of appellant deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying injunctive relief against the imposition and collection of the Business and Occupation Tax upon appellant's gross income, and in dismissing the action filed by the appellant and granting judgment in favor of the appellees.

11. The Supreme Court of the State of Washington by its judgment erred in failing to grant to appellant the relief sought in this action and in failing to grant judgment in its favor.

Wherefore, on account of the Errors hereinabove assigned, petitioner prays that the said judgment of the Supreme Court of the State of Washington dated the 8th day of April, 1937, in the above entitled cause be reversed and judgment be rendered in favor of this appellant.

Dated this 17th day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant.

[fol. 41] In Superior Court of Thurston County

No. 16407

Puget Sound Stevedoring Corporation, Plaintiff,

vs.

The Tax Commission of the State of Washington, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of said Commission, Defendants

Memo. Opinion

This is an action to enjoin the State Tax Commission from enforcing against the Plaintiff the provisions of the business and occupation tax law (Chapter 191, Laws of 1933 as amended by Chapter 57, Laws of extra session 1933 and Chapter 180, Laws of 1935).

Exhibit "A," attached to the complaint is a concise statement of the nature and scope of Plaintiff's business. From it, I am satisfied that Plaintiff is an independent contractor, locally engaged in furnishing service to carriers engaged in interstate commerce and that Plaintiff is not engaged in interstate commerce and under the cases cited and examined, I am of the opinion that the collection of the tax imposed by the law does not impose a burden, hindrance or obstruction upon interstate commerce.

The fact that the tax is imposed upon stevedoring companies and not upon a ship owner when doing its own stevedoring, does not render the law discriminatory and does not violate the equal protection clause of the Constitution. Neither does the law deprive the plaintiff of its property without due process of law.

A vast number of cases have been cited in the briefs, most of which have been examined and from those ap-

plicable to the facts herein I reach the above conclusion. Judgment may be for defendants, dismissing the action.

John M. Wilson, Judge.

[fol. 42] IN SUPREME COURT OF WASHINGTON

DEPARTMENT TWO

No. 26324

PUGET SOUND STEVEDORING COMPANY, a Corporation, Appellant,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Members of said Commission, Respondents

OPINION—Filed January 6, 1937

This is an appeal from a judgment dismissing, with prejudice, an action instituted to secure injunctive relief against the application to and enforcement against appellant of the so-called "Business and Occupation Tax Laws" as contained in Chap. 191, Laws of 1933, as amended and added to by Chap. 57, Ex. Sess. Laws of 1933 and Chap. 180, Laws of 1935.

In asserting that the business and occupational tax laws are not applicable to appellant, it is argued that appellant's business activities are within the exclusive jurisdiction and control of the Federal government inasmuch as the tax, if enforced against appellant, would amount to a burden, hindrance and obstruction upon interstate and foreign commerce contrary to Art. I, § 8, of the United States Constitution and further that the imposition of the tax upon appellant would constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and of Art. I, § 12, of our state constitution in that the tax could not be imposed upon shipowners doing their own stevedoring instead of employing the services of an independent contractor, such [fol. 43] as appellant. It is finally claimed that the imposition of the tax would deprive appellant of its property without due process of law in violation of the Fourteenth

Amendment to the Constitution of the United States and Art. I, §3, of the constitution of this state in that such tax is arbitrary, unreasonable, excessive and confiscatory.

Appellant, a Washington corporation, is now and for some years past has been engaged solely in the business of stevedoring at different ports within the state. It carries on its business by means of contracts which it makes with shipowners or shipmasters. These contracts are of three types; the first two provide for loading cargo on or discharging it from a ship, appellant employing the stevedores over whom it exercises control and whose operations it directs under general instructions and supervision of the ship's master. These contracts differ only in the method of determining the compensation to be paid appellant. By the third type of contract appellant, for a consideration, merely supplies the stevedores who work under the direction and complete supervision of the ship's officers, appellant advancing the pay to the laborers and thereafter collecting from the shipowner or master the amount of the payrolls, plus commission for services. Under the first two types of contracts the winches and steam for operating them, the booms, cargo-falls, and other deck appliances are usually supplied from the ship, while the slings, trucks and other cargo handling equipment are furnished by appellant. All the cargo handled under all three types of contracts moves in either interstate or foreign commerce or both and most of it is loaded on or unloaded from vessels flying foreign flags. The men hired by or through the company work on the ship or dock, or both. A further fact to be noted is that some shipowners employ stevedores without engaging [fol. 44] the services of a stevedoring company and in some instances the ship's crew does the stevedoring work.

We are satisfied that the record fully supports respondent's contention that appellant makes its contracts and renders its services thereunder as an independent contractor. Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. Ed. 480.

The real question, however, is whether the excise tax constitutes such a burden on interstate and foreign commerce as to violate the Federal constitution.

1 Cooley on Taxation, 4th ed., § 374, says:

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers

interstate commerce, it must appear that the burden is direct and substantial and not merely incidental and fortuitous. A tax is not invalid merely because it affects interstate commerce and impedes the transit of persons and property from one state to another 'just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.' "'

To the same effect is 14 Fletcher on Corporations, Rev. Ed., 431. Both of these texts cite numerous decisions from the United States Supreme Court.

Appellant argues that as it actually participates in the movement of interstate and foreign commerce and as the tax is upon the gross receipts from such commerce, it is a direct tax upon every ton of cargo moved and, hence, is unconstitutional according to McCall v. California, 136 U. S. 104; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, and Di Santo v. Pennsylvania, 273 U. S. 34. [fol. 45] Without detailing the facts of these three cases it is noted that each involves the imposition of a license tax directly upon the carrier of interstate and foreign commerce. In this case the tax is not imposed upon, or because of the kind of business appellant is engaged in, but rather upon the act or privilege of engaging in business activities without regard to its kind or nature.

A review of most of the authorities cited by counsel for both parties would lengthen this opinion unduly and is not necessary. We shall base our decision upon a few cases by the United States Supreme Court which are controlling in principle.

Bearing in mind that the business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state; that appellant is a domestic corporation operating an independent business entirely within this state; that the tax is not upon imports, exports or interstate or foreign commerce and that appellant is not a necessary factor in such commerce but has built up and renders an independent service which is advantageous to those who actually form a necessary and component part or link in such commerce, it is inconceivable that the imposition of such an excise conflicts or is inconsistent with any federal or state constitutional provision.

In Ficklen v. Shelby County Taxing District, 145 U. S. 1, that court affirmed a judgment of the supreme court of [fol. 46] Tennessee, sustaining a law of that state providing for a tax upon brokers and all persons not having a regularly licensed house of business in the taxing district of Shelby county to pay a tax of ten dollars per week, or twenty-five dollars per month for such privilege. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods, situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution.

"The language of the court in Lyng v. State of Michigan, 135 U. S. 161, 166, was: 'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.' But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business.

* * * * * * *

"* * * It is well settled that a state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196."

In Hump Hairpin Co. v. Emmerson, 258 U. S. 290, it was held that a state law of West Virginia providing for taxing

foreign corporations for the privilege of doing local busi-
[fol. 47] ness, which based the tax upon the capital stock actually represented by property located and business transacted within the state, plainly intending not to tax interstate commerce, reasonable as to amount and free from discrimination in favor of local corporations, is not unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. Among other things, the court there said:

"While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

Several cases are cited to sustain that principle and the court then continued:

"* * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

The United States Supreme Court sustained the law, which has been sustained by this court, in Pacific Telephone & Telegraph Co. v. Tax Commission, 56 Sup. Court Rep. 522, and several kindred cases, in which that court held that a state tax upon a local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce, since the question of constitutional validity is not to be determined by artificial standards, but an alleged indirect tax must be judged by its practical operation. It reiterated that while a state may tax the privilege of engaging in local business, it may not
[fol. 48] tax the privilege of engaging in interstate commerce, and any tax laid directly upon the privilege is void, even in the absence of legislation by Congress or a finding of prejudice.

These cases control and it is needless to go further afield in our inquiry.

The judgment is affirmed.

Holcomb, J.

We concur: Millard, C. J. Mitchell, J. Beals, J. Tolman, J.

[fol. 49] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed April 17, 1937

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Puget Sound Stevedoring Company, a corporation, respectfully shows:

That your petitioner is the appellant in the above entitled cause; that on January 13, 1936, your petitioner filed its complaint against the appellees above named in the Superior Court of the State of Washington for Thurston County, alleging that a statute of the State of Washington, to-wit, the Business and Occupation Tax (Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180, Laws of Washington 1935, being Sections 8370-4 to 8370-15, inclusive, of Remington's Revised Statutes of the State of Washington, 1936 Pocket Supplement), which purport to impose a tax or excise upon the gross receipts of petitioner for the privilege of engaging in the stevedoring business within the State of Washington, is repugnant to, and in conflict with, Section 8 of Article I of the Constitution of the United States, in that said tax or excise imposes a burden, hindrance or obstruction upon interstate or foreign commerce and upon the free and steady flow and movement of the same; likewise is repugnant to, and in conflict with, the Fourteenth Amendment to the Constitution of the United States in that said [fol. 50] tax or excise constitutes a denial to petitioner of the equal protection of the laws in violation of said Amend-

ment to the Constitution of the United States; likewise that the imposition of said tax or excise upon petitioner for the privilege of engaging in its business activities in the State of Washington is a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that said tax or excise is arbitrary, unreasonable, excessive and confiscatory.

Equitable grounds were alleged for and the issuance of an injunction was requested against the appellees above named, enjoining and restraining them from enforcing said Business and Occupation tax against petitioner.

Thereafter an answer was duly filed by appellees and the case was presented to the Honorable Judge of the Superior Court of Thurston County, the parties orally stipulating in open court that any affirmative matter contained in appellees' answer be deemed denied without the necessity for filing any formal reply thereto. At the conclusion of the hearing both parties moved for judgment on the pleadings and the cause was duly submitted to the court for final determination on the merits. Thereafter the court rendered its oral decision finding for the appellees. On August 3, 1936 a final judgment and decree was entered in the Superior Court of the State of Washington for Thurston County, dismissing the action with prejudice and with costs, petitioner duly excepting to said final judgment and decree and its exception was allowed.

An appeal from said final judgment and decree dismissing the action was taken to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington on January 6, 1937, affirmed the action of the lower court. The opinion of the Supreme Court in its entirety [fol. 51] dealt with the question of the validity of the Business and Occupation Tax in respect to the Constitution of the United States and found that said statute in its application to petitioner is not in conflict with, or repugnant to, the Commerce Clause of the Constitution of the United States, nor does said Act deny petitioner the equal protection of the laws, nor deprive the petitioner of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Within due time your petitioner filed its petition for rehearing, and thereafter said petition for rehearing was denied on April 8, 1937, and final judgment of said Supreme

Court denying the petitioner relief and affirming the dismissal of the action was entered on April 8, 1937. The Supreme Court of the State of Washington is the highest Court of said State in which a decision in this suit can be had. In said cause there is drawn into question the validity of a Statute of the State of Washington on the ground that said statute in its application to petitioner is repugnant to the Constitution and Laws of the United States of America and the decision of the highest Court of the State of Washington is in favor of its validity, notwithstanding your petitioner's contention that said Statute violates Article I, Section 8, of the Constitution of the United States and the Fourteenth Amendment thereto.

Therefore in accordance with Section 237-a of the Judicial Code (28 U. S. C. A. 344), and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237-a of the Judicial Code (28 U. S. C. A. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right. The errors upon which your petitioner claims to be entitled to an appeal are more fully [fol. 52] set out in the assignment of errors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest court of said state in which a decision in this case can be had, to the Supreme Court of the United States in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the records, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Washington under his hand and the seal of said court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made ad-

judging the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Dated this 17 day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant.

Serv. acknowledged. E. P. Donnelly, Asst. Atty. Genl.

[fol. 53] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 17, 1937

The petition of Puget Sound Stevedoring Company, a corporation, the appellant in the above entitled cause, for an order allowing an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this court and presented herein, accompanied by an Assignment of Errors and Statement as to Jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States of America from the final judgment, dated the 8th day of April, 1937, of the Supreme Court of the State of Washington, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty (60) days from this date make and transmit to the Supreme Court of the United States under his hand and the seal of said court, a true copy of the material parts of the record herein which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States; it is further

Ordered that said appellant shall give a good and suf-
[fol. 54] ficient cost bond in the sum of One Thousand Dol-

lars that said appellant shall prosecute said appeal to effect, and answer all costs, if it fails to make its plea good.

Dated this 17th day of April, 1937.

Wm. J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

O K. E. P. Donnelly, Asst. Atty. Genl.

[fols. 55-56] Bond on Appeal for $1,000.00, approved and filed April 17, 1937, omitted in printing.

[fols. 57-60] Citation in usual form, showing service on G. W. Hamilton et al., filed April 17, 1937, omitted in printing.

[fol. 61] In Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record—Filed April 17, 1937

It is Hereby Stipulated between Puget Sound Stevedoring Company, a corporation, appellant above named, and The Tax Commission of the State of Washington, and Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, members of said Commission, the appellees above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington, is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in and shall constitute said record on appeal:

1. Complaint (omitting "Exhibit B" thereto).
2. Answer.
3. Judgment and decree of the Superior Court dated August 3, 1936.
4. Notice of appeal to the Supreme Court of the State of Washington.

5. Assignments of error on appeal to the Supreme Court of the State of Washington.

6. Stipulation dated September 17, 1936, with attached "Exhibit A", except last page thereof.

7. Order of Supreme Court of the State of Washington denying petition for rehearing.

8. Judgment of the Supreme Court of the State of Washington.

9. Order of severance.

10. Assignments of error on appeal to the Supreme Court of the United States.

[fol. 62] 11. Statement as to jurisdiction with attached copies of the decision of the Superior Court of Thurston County and the Supreme Court of the State of Washington.

12. Petition for appeal.

13. Order allowing appeal and fixing cost bond.

14. Cost bond.

15. Citation.

16. Statement directing attention to United States Supreme Court Rule 12.

17. Proof of service of papers required by United States Supreme Court Rule 12.

18. Stipulation for transcript on appeal.

19. Clerk's certificate.

Dated this 17th day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant. G. W. Hamilton, E. P. Donnelly, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed May 18, 1937

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and

represents that the whole of the record as filed is necessary for the consideration of the case.

Dated this 17th day of April, 1937.

Ben C. Grosscup, Bernard H. Levinson, Attorneys for Appellant.

Due and timely service of the foregoing "Appellant's Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed" acknowledged this 17th day of April, 1937.

G. W. Hamilton, Attorney General of the State of Washington. E. P. Donnelly, Assistant Attorney General of the State of Washington, Attorneys for Appellees.

[fol. 65] [File endorsement omitted.]

Endorsed on cover: File No. 41,540. Washington Supreme Court. Term No. 68. Puget Sound Stevedoring Company, appellant, vs. The Tax Commission of the State of Washington, et al., etc. Filed May 18, 1937. Term No. 68, O. T. 1937.

FILE COPY

Supreme Court, U. S.
FILED
MAY 18 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 68

PUGET SOUND STEVEDORING COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 1000

PUGET SOUND STEVEDORING COMPANY,
A CORPORATION,

Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON AND HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, MEMBERS OF SAID COMMISSION,

Appellees.

STATEMENT AS TO JURISDICTION.

Filed in Clerk's Office, Supreme Court, State of Washington, April 17, 1937, Benj. T. Hart, Clerk.

Pursuant to Rule 12-1 of the Rules of the Supreme Court of the United States, appellant submits this statement as to jurisdiction showing the basis upon which it contends that this Court has jurisdiction upon appeal to review the action of the Supreme Court of the State of Washington.

This case was submitted to the court of first instance upon the pleadings which consisted of the plaintiff's complaint (R. 1) and the defendants' answer (R. 11). The facts as shown by the pleadings are as follows:

Facts of the Case.

Appellant, Puget Sound Stevedoring Company, is a Washington corporation engaged in the State of Washington in the business of stevedoring. By "stevedoring" is meant the continuous handling of cargo from the hold of a vessel to a "first place of rest" and vice versa.

All cargo discharged, loaded or handled by appellant is, at the time, moving *continuously* in *interstate* or *foreign* commerce, or both, being directly enroute from or to an interstate or foreign point. Appellant does not load, handle or discharge any intrastate or local cargo. While it performs stevedoring services for vessels under United States documentation engaged in the foreign, coastwise, and intercoastal trade, the bulk of its work is handling cargo received from or destined to vessels flying foreign flags.

Appellant's method of operation, which is typical of the industry, is as follows:

Each hold of a vessel is worked by a crew of men who are commonly called a "gang." The "gang" usually consists of the following:

1. Six men in the hold.
2. One or two winch-drivers.
3. A hatch-tender.
4. Two "sling-up men" on the dock.

The men in the hold place the cargo upon a sling which is hoisted by the ship's gear from the hold, swung over the

deck of the vessel and lowered to the dock. There, the ship's gear is disengaged by the two sling-up men and the load, as a *continuous* operation, is hauled away to "first place of rest." Here stevedoring ends in discharging.

In loading a vessel the same method is employed as outlined above, save in the reverse order. Stevedoring, in the loading operation, commences at the point where the cargo begins a *continuous* movement towards the ship's hold. At ship's side the sling, upon which the cargo is usually piled, is attached by the two sling-up men to the ship's tackle. The sling is hoisted over the side by the ship's tackle and lowered into the hold where it is stowed by the hold men.

Stevedoring, in the case of cargo handled through side ports, consists of the movement by truck from the vessel's hold through the side-ports to the "first place of rest", and vice versa.

Appellant furnishes its services under contract or arrangements with a ship owner or ship master. The arrangement may be: (a) To discharge or load cargo at a specified rate per ton, in which case appellant employs individual longshoremen over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master; (b) To load or discharge a vessel on a cost-plus basis, this method differing from (a) only in the fact that the method of compensation is different; (c) To act as labor agent for the ship owner or ship master, supplying him with individual longshoremen to load and discharge the vessel as his employees. Appellant here does not control or direct the operation of the individual longshoremen over whom the ship's officers assume complete supervision and direction. At the completion of the work appellant advances on behalf of the ship owner or ship master the payroll to pay the longshoremen, later billing the vessel and her owner the amount of the payroll plus its commission.

Some vessel owners, instead of employing a stevedoring company at all, employ longshoremen directly as their own employees to perform the necessary stevedoring for their vessels. The nature of the services performed is identical, whether performed by longshoremen as employees of the vessel or whether performed by longshoremen employed by a stevedoring company which loads the vessel under contract.

In the case of inbound cargo the minimum obligation imposed by the bill of lading upon every vessel stevedored by appellant is to discharge the cargo from the hold of the ship and deliver it alongside at ship's tackle. In the case of outbound cargo the minimum obligation imposed by the bill of lading upon every vessel stevedored by appellant is to accept the cargo alongside at ship's tackle and place it in the hold of the vessel. In both cases the carrier absorbs in its freight rate all expenses in connection with the stevedoring of the cargo between the hold of the vessel and the reach of ship's tackle and vice versa.

In some trades the vessel also absorbs stevedoring charges from ship's tackle to the "first place of rest" and vice versa. In the event the carrier does not absorb the stevedoring charges from ship's tackle to the "first place of rest" or vice versa, they are billed to the consignee or shipper as an extra charge. Whether absorbed by the vessel in its freight rate or paid by the consignee or shipper as an extra charge, such stevedoring services are the same.

The crew of a vessel used to do its stevedoring. Now this is unusual. Every seaport of any importance has available at all times competent and reliable stevedoring companies and experienced longshoremen in sufficient numbers to afford quick dispatch of the vessel.

Cargoes, here involved, arriving from interstate or foreign points may be destined to some interior point or may

be delivered to a consignee at the point of discharge. In either event, stevedoring ends with the continuous movement of the cargo from the hold of the vessel to the "first place of rest", and from that point or some further point the cargo may be transported by railroad car, truck, or otherwise, to the final point of destination, or at that point or some further point it may be received by the consignee. So, also, in the case of cargo originating at an inland point or originating in the port of embarkation, stevedoring in either case commences when the cargo begins to move continuously from "first place of rest" towards the hold of the vessel.

Stevedoring charges (in and out) represent approximately one-fourth to one-third of the freight revenue earned by the vessel.

Any interruption in or cessation of stevedoring services curtails and hinders the free and steady flow of commerce and trade through a port in an equal and like degree.

Statute under Which Jurisdiction of Supreme Court is Invoked.

The jurisdiction of this Court is invoked under Section 237-a of the United States Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928, and April 26, 1928 (Title 28, U. S. C., Sections 344-a, 861-a and 861-b).

Statutes of the State of Washington Here Challenged.

The statutes of the State of Washington, the validity of which is involved, are Chapter 191, Laws of Washington 1933 (pp. 869 *et seq.*), as amended by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157 *et seq.*), and Chapter 180, Laws of Washington 1935, Sections 4 to 15 (pp. 709 *et seq.*), Sections 185 to 210, inclusive (pp. 830 *et seq.*), and Section 216 (p. 849). These statutes create

what is commonly known as the "Business and Occupation Tax".

Laws of Washington 1933.

Chapter 191, Laws of Washington 1933, Sec. 2 (2) (p. 871) provides in part:

> "* * * there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against * * * gross income * * * *."

Section 1 (6) (p. 869) provides in part:

> "The term 'gross income' means * * * all receipts, actually received by reason of * * * the business engaged in, * * * without any deduction on account of * * * labor costs, * * * or any other expenses whatsoever * * * *."

Subsequent sections of the Act provide for its administration by the appellees and provide stringent penalties in the event persons subject to the Act fail to comply therewith.

Laws of Washington Extraordinary Session 1933.

It was by Chapter 57, Laws of Washington Extraordinary Session 1933 (pp. 157 *et seq.*), which amended Chapter 191, Laws of Washington 1933 (pp. 869 *et seq.*), that an attempt was first made to subject the business of the appellant to the provisions of the earlier act by the addition of a new section to be known as 2-a. This section provides in part as follows:

> "(1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, * * *

an annual tax or excise for the privilege of engaging in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *."

Laws of Washington 1935.

Chapter 180, Laws of Washington 1935, Section 4 (p. 709), provides in part as follows:

"From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against * * * gross income of the business, * * * as follows: * * *."

Section 4-(e) (pp. 710 *et seq.*) provides in part as follows:

"Upon every person engaging within this state in any business activity * * * as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. * * *"

Section 5-(g) (pp. 712 *et seq.*) provides in part as follows:

"The term 'gross income of the business' means the * * * compensation for the rendition of services, * * * all without any deduction on account of * * * labor costs, * * * or any other expense whatsoever paid or accrued and without any deduction on account of losses;"

Section 216 (p. 849) provides in part as follows:

"No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, State of Wash-

ington, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith * * *."

Other sections of the Act provide for its administration by the appellees and provide stringent penalties in the event persons subject to the Act fail to comply therewith.

The statutes referred to above have been before the Supreme Court of the State of Washington and before the Supreme Court of the United States on several occasions. It is now well settled that the tax is not a property tax. It is an excise tax measured by and imposed upon gross income. It is imposed upon the privilege of engaging in business. It is solely a revenue measure and not an exercise of the police power of the State.

State ex rel. Stiner v. *Yelle,* 174 Wash. 402, 25 Pac. (2d) 91;

Cascade Telephone Co. v. *State Tax Commission,* 176 Wash. 616, 30 Pac. (2d) 974;

Supply Laundry v. *Jenner,* 178 Wash. 72, 34 Pac. (2d) 363;

Paramount v. *Henneford,* 184 Wash. 376, 51 Pac. (2d) 385; certiorari denied 298 U. S. 665;

Northern Pacific v. *State Tax Commission,* 297 U. S. 403, affirming 183 Wash. 33, 48 Pac. (2d) 931;

Fisher's Blend, Inc., v. *Tax Commission,* 297 U. S. 650, reversing 182 Wash. 163, 45 Pac. (2d) 942; 49 Pac. (2d) 115.

Judgment of the Supreme Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington sought to be reversed was entered April 8, 1937 (R. 23). The time for taking an appeal began to run from the date of said judgment. (See *Puget Sound Power & Light Company* v. *King County,* 264 U. S. 22, where the

time for taking an appeal from a judgment of the Supreme Court of the State of Washington is considered). The petition for appeal is presented April 17, 1937 (R. 49).

The judgment and decree of the trial court dated August 3, 1936, provides in part (R. 14):

> "It is by the court ordered, adjudged and decreed that this action be and the same is dismissed with prejudice and with statutory costs."

The judgment of the Supreme Court of the State of Washington affirms the judgment and decree of the trial court (R. 23). A judgment of dismissal is final.

Wilson v. *Republic Iron & Steel Company*, 257 U. S. 92;

Gulf Refining Co. v. *United States*, 269 U. S. 125;

Fisher's Blend, Inc., v. *Tax Commission*, 297 U. S. 650.

Court Appealed From is Highest Court of the State of Washington.

The judgment of the Supreme Court of the State of Washington is that of the highest court in which, under the laws of the State of Washington, such judgment could be had. No further appeal is possible save to the Supreme Court of the United States; hence, the appeal is taken from "a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had."

Constitution of the State of Washington, Art. IV, Sections 1, 4 and 6.

See

Remington's Revised Statutes of Washington, 1932, Vol. 1, pp. 422, 425, 428;

Remington's Revised Statutes of Washington, 1932, Vol. 4, Sec. 1716, p. 10;

Section 1737, p. 72; Section 1740, p. 74;

Section 1741, p. 75.

How the Federal Question Was Raised.

The questions sought to be reviewed in this Court were raised in the Superior Court of Thurston County (the court of first instance) by appellant's complaint of which paragraphs III, V, VI and VII are as follows:

"III.

Plaintiff is engaged solely in the business of stevedoring or loading, discharging and handling of cargoes of vessels engaged exclusively in interstate or foreign commerce, or both. Said cargoes while so handled are at all times in continuous movement from the hold of a vessel to first place of rest, or vice versa. A more particular description of the nature and character of the plaintiff's business activities and of the stevedoring industry is attached hereto, marked Exhibits A and B, and made a part hereof.

* * * * * * *

V.

The business activities of the plaintiff are within the exclusive jurisdiction and control of the United States of America. The above tax or excise if enforced against plaintiff is in direct violation of Article I, Section 8 of the Constitution of the United States of America in that said tax or excise imposes a burden, hindrance and obstruction upon interstate and foreign commerce and upon the free and steady flow and movement of the same.

VI.

The imposition of the said tax or excise upon the plaintiff for the privilege of engaging in its business activities in the State of Washington likewise constitutes a denial to plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment, to the Constitution of the United States, and Article

I, Section 12, of the Constitution of the State of Washington, in that said tax or excise is threatened to be imposed upon the business activities of the plaintiff as a contracting stevedore, but same is not imposed upon a ship owner when doing its own stevedoring in lieu of employing the services of an independent contractor such as plaintiff.

VII.

The imposition of the said tax or excise upon the plaintiff for the privilege of engaging in its business activities in the State of Washington is likewise a deprivation of plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington, in that said tax or excise is arbitrary, unreasonable, excessive and confiscatory'' (R. 1, 2, 3).

Paragraphs VIII and IX of the complaint set forth equitable grounds for relief (R. 3). An answer admitting the essential facts set out in the complaint was filed in the action by the appellees (R. 11). Both parties moved for judgment on the pleadings and the matter was submitted on the merits to the court for adjudication. The court delivered an oral opinion, a copy of which is attached hereto and made a part hereof. The decision of the trial court expressly stated the objection urged by appellant under the Federal Constitution and upheld the tax as valid thereunder. On August 3, 1936, the trial court entered a final judgment dismissing the action with prejudice, to all of which the plaintiff and appellant duly excepted and its exception was allowed (R. 14). An appeal was taken to the Supreme Court of the State of Washington, the appellant urging in its assignments of error (R. 16) the same constitutional grounds set forth in its complaint. Such assignments of error to the Supreme Court of the State of Wash-

ington appear in Brief of Appellant in that court in accordance with state practice.

Remington's Revised Statutes of Washington 1932, Vol. 4, Sec. 1730, p. 31;

Remington's Revised Statutes of Washington 1932, Vol. 1, p. 146, Rules of the Supreme Court, Rule VIII.

Such assignments of error were in part as follows:

"2. The trial court erred in holding that the appellant is not engaged in Interstate and Foreign Commerce.

* * * * * * *

4. The trial court erred in holding that the imposition and collection from the appellant of the Business and Occupation Tax does not impose a burden, hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

* * * * * * *

6. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant, and not upon a ship owner when doing his own stevedoring, does not deprive the plaintiff of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

8. The trial court erred in holding that the imposition of the Business and Occupation Tax upon the appellant does not deprive the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

10. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations is an unlawful and illegal bur-

den, hindrance and obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 (3), of the Constitution of the United States.

* * * * * * *

12. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations, and not upon a ship owner doing his own stevedoring, does not deprive the appellant of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

14. The trial court erred in failing to hold that the imposition of the Business and Occupation Tax law upon appellant deprives the appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

The Supreme Court of the State of Washington affirmed the judgment of the Superior Court of Thurston County and in its opinion, copy of which is hereto attached and made a part hereof, expressly set forth as follows the grounds urged by appellant in contending that the application of the Business and Occupation Tax to appellant's operations violated the Constitution of the United States:

"In asserting that the business and occupational tax laws are not applicable to appellant, it is argued that appellant's business activities are within the exclusive jurisdiction and control of the Federal government, inasmuch as the tax, if enforced against appellant would amount to a burden, hindrance and obstruction upon interstate and foreign commerce contrary to Art. I, § 8, of the United States constitution; and further that the imposition of the tax upon appellant would constitute a denial of equal protection of the laws in violation of the fourteenth amendment to the constitution of the United States and of Art. I, § 12, of our state con-

stitution, in that the tax could not be imposed upon shipowners doing their own stevedoring instead of employing the services of an independent contractor, such as appellant. It is finally claimed that the imposition of the tax would deprive appellant of its property without due process of law in violation of the fourteenth amendment to the constitution of the United States and Art. I, § 3, of the constitution of this state, in that such tax is arbitrary, unreasonable, excessive and confiscatory."

The opinion and judgment which the Supreme Court rendered and entered could not have been rendered or entered without denying to appellant all of the rights asserted by it under the constitutional privileges relied upon and said opinion and judgment cannot be rested upon any independent non-Federal grounds.

It is submitted that the judgment plainly and definitely draws in question the validity of the statute on the ground of its being repugnant to the Constitution of the United States, as required by Section 237 of the Judicial Code, as amended, and that this appeal comes within the proper jurisdiction of this Court.

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Questions Involved are Substantial as Shown by Repeated Decisions of This Court.

The following cases substantiate appellant's contention that one engaged in an essential and component part of, and link in, interstate and foreign commerce is himself engaged in interstate and foreign commerce. It is wholly immaterial that the activities constituting such an essential and component part of, and link in, interstate and foreign commerce are performed wholly within the limits of a single State.

Foster v. *Davenport*, 22 How. 244;

The Daniel Ball, 10 Wall. 557;

Gloucester Ferry v. *Pennsylvania*, 114 U. S. 196;

McCall v. *California*, 136 U. S. 104;
Rhodes v. *Iowa*, 170 U. S. 412;
Texas Transport v. *New Orleans*, 264 U. S. 150;
Hughes v. *Minnesota*, 272 U. S. 469;
Di Santo v. *Pennsylvania*, 273 U. S. 34;
Northern Coal Co. v. *Strand*, 278 U. S. 142;
United States v. *Erie Railroad*, 280 U. S. 98;
United States v. *California*, 297 U. S. 175;
People v. *Miller*, 178 N. Y. 194; 70 N. E. 472;
National Labor Board v. *National New York Co.*, 86 F. (2d) 98.

As appellant is engaged solely in interstate and foreign commerce the imposition of the Business and Occupation Tax of the State of Washington upon its gross receipts is in violation of Article I, Section 8 of the Constitution of the United States.

Fisher's Blend, Inc. v. *Tax Commission*, 297 U. S. 650.

The difference between stevedoring performed by a vessel with its own employees and stevedoring performed by a stevedoring company is a distinction without a difference. The work performed and the individuals performing it in both cases are the same. Appellant contends that the imposition of the Business and Occupation Tax upon its operations and not upon the operations of a vessel doing its stevedoring with its own employees is a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. See

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389;
Colgate v. *Harvey*, 296 U. S. 404.

Respectfully submitted,

BEN C. GROSSCUP,
BERNARD H. LEVINSON,
Attorneys for Appellant.

EXHIBIT "A".

(Copy.)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY.

No. 16407.

PUGET SOUND STEVEDORING CORPORATION, *Plaintiff*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, members of said Commission, *Defendants*.

MEMO. OPINION.

This is an action to enjoin the State Tax Commission from enforcing against the Plaintiff the provisions of the business and occupation tax law (Chapter 191, Laws of 1933 as amended by Chapter 57, Laws of extra session 1933 and Chapter 180, Laws of 1935).

Exhibit "A," attached to the complaint is a concise statement of the nature and scope of Plaintiff's business. From it, I am satisfied that Plaintiff is an independent contractor, locally engaged in furnishing service to carriers engaged in interstate commerce and that Plaintiff is not engaged in interstate commerce and under the cases cited and examined, I am of the opinion that the collection of the tax imposed by the law does not impose a burden, hindrance or obstruction upon interstate commerce.

The fact that the tax is imposed upon stevedoring companies and not upon a ship owner when doing its own stevedoring, does not render the law discriminatory and does not violate the equal protection clause of the Constitution. Neither does the law deprive the plaintiff of its property without due process of law.

A vast number of cases have been cited in the briefs, most of which have been examined and from those ap-

plicable to the facts herein I reach the above conclusion. Judgment may be for defendants, dismissing the action.

JOHN M. WILSON,
Judge.

EXHIBIT "B".

(Copy.)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON.

DEPARTMENT TWO.

No. 26324.

PUGET SOUND STEVEDORING COMPANY, a Corporation, *Appellant*,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission, *Respondents.*

Filed Jan. 6, 1937.

This is an appeal from a judgment dismissing, with prejudice, an action instituted to secure injunctive relief against the application to and enforcement against appellant of the so-called "Business and Occupation Tax Laws" as contained in Chap. 191, Laws of 1933, as amended and added to by Chap. 57, Ex. Sess. Laws of 1933 and Chap. 180, Laws of 1935.

In asserting that the business and occupational tax laws are not applicable to appellant, it is argued that appellant's business activities are within the exclusive jurisdiction and control of the Federal government inasmuch as the tax, if enforced against appellant, would amount to a burden, hindrance and obstruction upon interstate and foreign commerce contrary to Art. I, § 8, of the United States Constitution and further that the imposition of the tax upon appellant would constitute a denial of equal protection

of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and of Art. 1, § 12, of our state constitution in that the tax could not be imposed upon shipowners doing their own stevedoring instead of employing the services of an independent contractor, such as appellant. It is finally claimed that the imposition of the tax would deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Art. I, § 3, of the constitution of this state in that such tax is arbitrary, unreasonable, excessive and confiscatory.

Appellant, a Washington corporation, is now and for some years past has been engaged solely in the business of stevedoring at different ports within the state. It carries on its business by means of contracts which it makes with shipowners or shipmasters. These contracts are of three types; the first two provide for loading cargo on or discharging it from a ship, appellant employing the stevedores over whom it exercises control and whose operations it directs under general instructions and supervision of the ship's master. These contracts differ only in the method of determining the compensation to be paid appellant. By the third type of contract appellant, for a consideration, merely supplies the stevedores who work under the direction and complete supervision of the ship's officers, appellant advancing the pay to the laborers and thereafter collecting from the shipowner or master the amount of the payrolls, plus commission for services. Under the first two types of contracts the winches and steam for operating them, the booms, cargo-falls, and other deck appliances are usually supplied from the ship, while the slings, trucks and other cargo handling equipment are furnished by appellant. All the cargo handled under all three types of contracts moves in either interstate or foreign commerce or both and most of it is loaded on or unloaded from vessels flying foreign flags. The men hired by or through the company work on the ship or dock, or both. A further fact to be noted is that some shipowners employ stevedores without engaging the services of a stevedoring company and in some instances the ship's crew does the stevedoring work.

We are satisfied that the record fully supports respondent's contention that appellant makes its contracts and renders its services thereunder as an independent contractor. Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. Ed. 480.

The real question, however, is whether the excise tax constitutes such a burden on interstate and foreign commerce as to violate the Federal constitution.

1 Cooley on Taxation, 4th ed., § 374, says:

"To warrant interference with the exercise of the taxing power of a state on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial and not merely incidental and fortuitous. A tax is not invalid merely because it affects interstate commerce and impedes the transit of persons and property from one state to another 'just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed.'"

To the same effect is 14 Fletcher on Corporations, Rev. Ed., 431. Both of these texts cite numerous decisions from the United States Supreme Court.

Appellant argues that as it actually participates in the movement of interstate and foreign commerce and as the tax is upon the gross receipts from such commerce, it is a direct tax upon every ton of cargo moved and, hence, is unconstitutional according to McCall v. California, 136 U. S. 104; Texas Transport & Terminal Co. v. New Orleans, 264 U. S. 150, and Di Santo v. Pennsylvania, 273 U. S. 34. Without detailing the facts of these three cases it is noted that each involves the imposition of a license tax directly upon the carrier of interstate and foreign commerce. In this case the tax is not imposed upon, or because of the kind of business appellant is engaged in, but rather upon the act or privilege of engaging in business activities without regard to its kind or nature.

A review of most of the authorities cited by counsel for both parties would lengthen this opinion unduly and is not necessary. We shall base our decision upon a few cases

by the United States Supreme Court which are controlling in principle.

Bearing in mind that the business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state; that appellant is a domestic corporation operating an independent business entirely within this state; that the tax is not upon imports, exports or interstate or foreign commerce and that appellant is not a necessary factor in such commerce but has built up and renders an independent service which is advantageous to those who actually form a necessary and component part or link in such commerce, it is inconceivable that the imposition of such an excise conflicts or is inconsistent with any federal or state constitutional provision.

In Ficklen v. Shelby County Taxing District, 145 U. S. 1, that court affirmed a judgment of the supreme court of Tennessee, sustaining a law of that state providing for a tax upon brokers and all persons not having a regularly licensed house of business in the taxing district of Shelby county to pay a tax of ten dollars per week, or twenty-five dollars per month for such privilege. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods, situated in another state, does not necessarily involve the taxation of interstate commerce, forbidden by the constitution.

"The language of the court in Lyng v. State of Michigan, 135 U. S. 161, 166, was: 'We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regu-

lation of it, which belongs solely to Congress.' But here the tax was not laid on the occupation or business of carrying on interstate commerce, or exacted as a condition of doing any particular commission business; and complainants voluntarily subjected themselves thereto in order to do a general business.

* * * * * * *

"* * * It is well settled that a state has power to tax all property having a *situs* within its limits, whether employed in interstate commerce or not. It is not taxed because it is so employed, but because it is within the territory and jurisdiction of the state. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196."

In Hump Hairpin Co. v. Emmerson, 258 U. S. 290, it was held that a state law of West Virginia providing for taxing foreign corporations for the privilege of doing local business, which based the tax upon the capital stock actually represented by property located and business transacted within the state, plainly intending not to tax interstate commerce, reasonable as to amount and free from discrimination in favor of local corporations, is not unconstitutional merely because a trifling part resulted from inclusion of interstate business in the basis of computation. Among other things, the court there said:

"While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights."

Several cases are cited to sustain that principle and the court then continued:

"* * * The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so di-

rectly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it."

The United States Supreme Court sustained the law, which has been sustained by this court, in Pacific Telephone & Telegraph Co. v. Tax Commission, 56 Sup. Court Rep. 522, and several kindred cases, in which that court held that a state tax upon a local privilege only must be held valid in the absence of proof that it imposes an undue burden upon interstate commerce, since the question of constitutional validity is not to be determined by artificial standards, but an alleged indirect tax must be judged by its practical operation. It reiterated that while a state may tax the privilege of engaging in local business, it may not tax the privilege of engaging in interstate commerce, and any tax laid directly upon the privilege is void, even in the absence of legislation by Congress or a finding of prejudice.

These cases control and it is needless to go further afield in our inquiry.

The judgment is affirmed.

HOLDCOMB, *J.*

We concur:

MILLARD, *C. J.*
MITCHELL, *J.*
BEALS, *J.*
TOLMAN, *J.*

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No. 68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

PUGET SOUND STEVEDORING COMPANY,
Appellant,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

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THE ARGUS PRESS, SEATTLE

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THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

PUGET SOUND STEVEDORING COMPANY, *Appellant*,

vs.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission, *Appellees*.

No. 68

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from the Supreme Court of the State of Washington. Statement as to Jurisdiction was duly filed under Paragraph 1 of Rule 12 of the Revised Rules of the Supreme Court of the United States, and probable jurisdiction was noted by this court on June 1, 1937. The opinion in the court below is reported in 189 Washington , 63 Pacific (2d) 532.

STATEMENT OF THE CASE

Appellant in this action seeks to enjoin the imposition upon its gross receipts of the so-called Business and Occupation Tax created by Chapter 191, Laws of

Washington, 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session, 1933, as amended by Chapter 180, Laws of Washington, 1935. The case is submitted on the pleadings. The complaint sets forth the facts in detail. The answer admits the facts and denies the right to the relief sought.

UNDISPUTED FACTS

Appellant Puget Sound Stevedoring Company is a Washington corporation engaged in the stevedoring business in the State of Washington. The term "stevedoring" is here used in its *strict* sense. By "stevedoring" is meant the transporting of cargo from the hold of a vessel to "first place of rest," or vice versa. All cargo while so transported is in *continuous movement* from the hold of a vessel to "first place of rest," or vice versa. All cargo while so transported is at the time in continuous movement in *interstate* or *foreign* commerce, being directly en route from or to an interstate or foreign point. The movement in interstate or foreign commerce has already begun at or before the time when appellant's services commence and such movement does not end until at or after appellant ends its services (R. 1, 5, 6).

"Stevedoring" may be described in more detail as follows:

Each hold of a vessel is worked by a crew of men who are commonly referred to as a "gang." A gang is usually composed of the following:

(a) Six men in the hold of the vessel.

(b) One or two winchdrivers, depending upon whether the vessel is equipped with double or single winches.

(c) A hatchtender or straw boss who supervises the work of the gang.

(d) Two "sling-up" men.

In discharging a vessel the hold men collect the cargo in the hold and place it upon a sling which is hoisted by the ship's gear from the hold, swung over the deck and lowered to the dock. At this point the ship's gear is disengaged by the "sling-up" men and the load is hauled away as a *continuous* operation to "first place of rest". Here stevedoring *ends* in the discharging process.

In loading a vessel the same method is employed as that outlined above save in the reverse order. When the cargo begins its *continuous* movement towards the ship's hold *stevedoring* begins. At ship's side the sling on which the cargo is resting is fastened by the "sling-up" men to the ship's tackle. The sling is then hoisted by the ship's gear over the side and across the deck and into the hold of the vessel. There the cargo is removed from the sling by the hold men and stowed in the hold (R. 6, 7).

By the term "first place of rest" is meant the point to which, or the point from which, the cargo moves *continuously* from or to the hold of the ship. As soon as the *continuity* of the movement ceases, the handling of the cargo ceases to be "stevedoring" (R. 7).

Under its bills of lading every vessel here under

consideration assumes the obligation *and cost* of stevedoring between the hold of a vessel and the reach of its tackle (R. 7).

The cost of stevedoring between ship's tackle and "first place of rest" in some trades is likewise absorbed in the vessel's freight rate (R. 7).

In other trades the costs of stevedoring between ship's tackle and "first place of rest" are billed as an extra charge to the shipper or consignee (R. 7).

Appellant is always employed by the ship owner or the ship's master (R. 4, 5). This is true whether stevedoring between ship's tackle and "first place of rest" is ultimately billed as an extra charge to the consignee or the shipper or absorbed in the vessel's freight rate (R. 7).

While appellant stevedores the cargoes for vessels under United States documentation engaged in the foreign, coastwise and intercoastal trade, the bulk of its work consists of discharging and loading cargoes received from or destined to vessels flying foreign flags (R. 6).

Appellant may arrange with a ship owner or ship master to stevedore a vessel in any one of the following three ways:

1. To discharge or load a vessel at a specified rate per ton of cargo handled. Appellant's own employees in this case perform the manual labor involved over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master.

2. To discharge or load a vessel on a cost plus basis. Here again, appellant's own employees perform

the manual labor involved over whom it exercises control and whose operations it directs under the general instructions and supervision of the ship's master. This method differs from (1) above only in the fact that the computation of compensation is on a different basis.

3. To *arrange* for stevedoring by securing for the ship owner or ship master longshoremen to perform the manual labor. Appellant in this case does not control or direct the operations. The ship's officers assume complete supervision and direction, the longshoremen working as direct employees of the vessel and owners. Appellant at the conclusion of such an operation advances the pay-roll to pay off the longshoremen, later billing the vessel and her owner the amount of the pay-roll so advanced, plus a commission for its services (R. 4, 5).

Stevedoring was once exclusively performed by the crew of the vessel. This is now quite rare because of larger vessels, smaller crews, faster schedules, and the presence of experienced stevedores in every port.

Stevedoring is admittedly an essential link in and component part of water-borne commerce (R. 8). Exhibit A, attached to the complaint in this case, says in part:

> "* * * Any interruption of the service of such cargo handlers cripples the activities and business of a port and the free and steady flow of commerce and trade through the port is sharply and abruptly slowed, hindered and obstructed." (R. 8)

This is not denied.

Transportation by water is sometimes carried on in what may be termed an *integrated* operation in so far as stevedoring is concerned. In such case ship owners employ no stevedoring company at all. The stevedoring operation for their vessels is performed with their own employees and under their own management as a part of their general operations (R. 6).

A ship owner may, on the other hand, find that the scope of his operations is such that stevedoring of his vessels may be more efficiently, economically and satisfactorily performed by the employment of a stevedoring company to perform the operation, including both the actual labor and the supervision (R. 4, 5).

As a method partaking somewhat of the elements of each, a ship owner may merely employ a stevedoring company to arrange for stevedoring by securing longshoremen to work under the direction of the ship's officers (R. 5).

STATUTES CHALLENGED

Chapter 191, Laws of Washington 1933, "An act relating to taxation; imposing taxes upon the privilege of engaging in business activities, etc.," provides in part as follows:

> "Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an *annual tax or excise for the privilege of engaging in business activities.* Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or *gross income*, as the case *may be, as follows*: * * *" (Italics ours.)
>
> "Sec. 3. If any person shall engage or continue in any business or performance of any function for which a *privilege tax* is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington *a license under this act to engage in and to conduct such business or perform such function* for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function." (Italics ours)

Chapter 57, Laws of Washington Extraordinary Session 1933, amending the earlier Act above, provides as follows:

> "Section 2-a. (1) From and after the first day of January, 1934, and until the thirty-first day

of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from every person engaging or continuing within this state in any business not specifically taxable under section 2 of this act, *an annual tax or excise* for the *privilege of engaging* in such business; as to such persons the amount of the tax or excise shall be equal to the *gross income* of the business multiplied by the rate of five-tenths of one per cent; * * *"

Chapter 180, Laws of Washington 1935, "An Act relating to revenue and taxation; providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities, etc.," superseding the two earlier Acts, provides as follows:

"Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person *a tax for the act or privilege of engaging in business activities.* Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: * * *"

"(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d) above; as to such persons the amount of tax on account of such activities shall

be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale); repairing, personal, business, professional, mechanical and educational service businesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses."

"Sec. 187. If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall * * * apply for and obtain from the commission, upon the payment of a fee of one dollar, *a registration certificate* for each calendar year, or portion thereof. Said registration certificate shall be personal and non-transferable and shall expire on the last day of the calendar year for which issued and shall be renewed annually upon the condition that the taxpayer shall pay the aforesaid registration fee *and the tax accrued to the state under the provisions of this act.* * * * No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section." (Italics ours)

See Appendix I for a more detailed analysis of the statutes involved.

ASSIGNED ERRORS RELIED UPON

1. The Supreme Court of the State of Washington erred in failing to hold that the operations of the appellant in handling cargo in continuous movement in Interstate and Foreign Commerce from the hold of a vessel to first place of rest and *vice versa* form an essential and component part of and an essential link in Interstate and Foreign Commerce (R. 20).

2. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the appellant is engaged solely in Interstate and Foreign Commerce (R. 20).

3. The Supreme Court of the State of Washington by its judgment erred in holding that appellant is not a necessary factor in Interstate and Foreign Commerce but merely renders an independent service of advantage to those actually forming a necessary component part or link in such commerce (R. 20).

4. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the Business and Occupation Tax (Chapter 191 Laws of Washington 1933, as amended by Chapter 57 Laws of Washington Extraordinary Session 1933 and Chapter 180 Laws of Washington 1935) upon its gross income does not impose a burden, hindrance or obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8, of the Constitution of the United States (R. 20).

5. The Supreme Court of the State of Washington by its judgment erred in holding that the imposition

of said Business and Occupation Tax upon appellant, and not upon a ship-owner doing its own stevedoring, does not deprive the appellant of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (R. 20-21).

6. The Supreme Court of the State of Washington in its judgment erred in failing to hold that the imposition of said Business and Occupational Tax upon appellant's gross income is an unlawful and illegal burden, hindrance and obstruction upon Interstate and Foreign Commerce, in violation of Article I, Section 8, of the Constitution of the United States (R. 21).

7. The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the Business and Occupation Tax upon appellant's operations and not upon a ship-owner doing its own stevedoring deprives the appellant of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States (R. 21).

8. The Supreme Court of the State of Washintgon by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying injunctive relief against the imposition and collection of the Business and Occupation Tax upon appellant's gross income, and in dismissing the action filed by the appellant and granting judgment in favor of the appellees (R. 21).

9. The Supreme Court of the State of Washington

by its judgment erred in failing to grant to appellant relief sought in this action and in failing to grant judgment in its favor (R. 21).

GENERAL PRINCIPLES INVOLVED

These statutes have been before the Supreme Court of the State of Washington and before this court in several cases. From these decisions the nature and character of the tax is now firmly established. The tax is not a property tax. It is an excise or occupation tax imposed upon the *privilege* of doing business. The tax is imposed for *revenue*, not for *regulation*. The tax is measured by and imposed upon *gross receipts* derived from the doing of business.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P. (2d) 91;

Supply Laundry v. Jenner, 178 Wash. 72, 34 P. (2d) 363;

Pacific Telephone & Telegraph Co. v. Tax Commission, 183 Wash. 697, 48 P. (2d) 938, affirmed 297 U. S. 403;

Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650;

Paramount v. Henneford, 184 Wash. 376, 51 P. (2d) 385; Certiorari denied 298 U. S. 665.

It is well settled that a state may not directly tax the privilege of engaging in interstate or foreign

commerce nor may it place a direct tax on the gross receipts from such commerce.

Philadelphia S. S. Co v. Pennsylvania, 122 U. S. 326;

Leloup v. Port of Mobile, 127 U. S. 640;

Galveston v. Texas, 210 U. S. 217;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292;

U. S. Glue Co. v. Oak Creek, 247 U. S. 321;

Helson v. Kentucky, 279 U. S. 245;

New Jersey Bell Tel. Co. v. State, 280 U. S. 338;

East Ohio Gas Co. v. Tax Commission, 283 U. S. 465;

Virginia v. Imperial Coal Co., 293 U. S. 15;

Pacific Telephone & Telegraph Co., v. Tax Commission, 183 Wash. 697, 48 P. (2d) 938, affirmed 297 U. S. 403, *supra;*

Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650, *supra.*

Where there is no constitutional basis for the tax it is void even in the absence of legislation by Congress or a finding of prejudice.

Pacific Telephone & Telegraph Co. v. Tax Commission, supra.

See:

Alpha Cement Co. v. Massachusetts, 268 U. S. 203;

Cudahy v. Hinkle, 278 U. S. 460.

ARGUMENT

I. IMPOSITION OF THE TAX VIOLATES THE COMMERCE CLAUSE

A. Stevedoring Is Interstate and Foreign Commerce

Stevedoring here involved is limited to the transportation of cargoes *then moving continuously* in interstate or foreign commerce. Stevedoring has always been recognized as a distinct link in the chain of maritime commerce. In earlier days the crew performed this essential step in transportation.

In *The Senator*, 21 Fed. 191, the court, speaking of "stevedoring", said (p. 191):

> "* * * The demand for such service cannot be fulfilled by the common laborer; hence they have become so connected with navigation, to load as well as unload vessels, that they are regarded as a *part of the maritime machinery* for the commerce of the lakes. They perform an *indispensable part of the transportation* and delivery of a cargo,—to begin it and conclude it. If services intermediate are regarded as maritime, why not the commencing and closing service?" (Italics ours)

Again, in *Florez v. The Scotia*, 35 Fed. 916, the court said (p. 916):

> "* * * *The work of unloading is undeniably a maritime service.* It is a part of the performance of the vessel's maritime contract of carriage, and necessary to enable the ship to earn her freight. It is, therefore, *not merely a service* to the ship, but a *necessary service.*" (Italics ours)

So, again, in *The Main*, 51 Fed. 954, the court used the following language (p. 957):

> "* * * It must be conceded that when the ship has finished its transit, and arrived at its port of destination, the *cargo must be unloaded.* It must also be conceded that cargo delivered on the wharf, and received by the master for outward voyage, is at the risk of the ship, and *must be loaded.* These are services that the master is *compelled* to have performed. * * * Stowage of cargo is primarily a duty of the master, but is now generally performed by a stevedore, and it is a very important service to the ship; for on it depends the safe carrying of the cargo, and frequently the safety of the ship." (Italics ours)

This court in *International Stevedoring Co. v. Haverty*, 272 U. S. 50, said (p. 52):

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew."

In *Michigan Furniture Co. v. Southern Pacific Co.*, 287 N. Y. S. 178, the principles thus well established are summed up as follows (p. 181):

> "The courts have explicitly held that loading and stowing a cargo on ship is a maritime service; that it involves the safety of the ship; that it is a *service formerly performed by members of the crew;* but that the exigencies of increasing commerce demanded the specialized service which has devolved upon a class as clearly identified

with maritime affairs as are the mariners." (Italics ours)

It is at once apparent that loading a vessel in preparation for her departure, and discharging a vessel upon her arrival at destination are essentially part of interstate and foreign commerce.

In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, the State of Pennsylvania attempted to collect a capital tax on the capital stock of a New Jersey corporation operating a ferry from Gloucester, New Jersey, to Philadelphia. The ferry company's only property in the State of Pennsylvania was a leased wharf at which it loaded and discharged cargo and picked up and landed passengers. The lower court held that the ferry company was doing business within the State of Pennsylvania as it received and landed passengers and freight on a wharf within that state. This, as the lower court held, was sufficient to make the capital stock tax applicable. In reversing the lower court and in holding the tax unconstitutional this court said (p. 203):

> "* * * Transportation implies the *taking up* of persons or property at some point and *putting them down* at another. *A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation;* that is, upon the commerce between the two states involved in such transportation." (Italics ours)

Also (at pages 213-214):

> "* * * Receiving and landing passengers and freight is incident to their transportation. With-

out both there could be no such thing as their transportation across the river Delaware. The transportation, as to passengers, is not completed until, as said in the *Henderson* case, they are disembarked at the pier of the city to which they are carried; and, as to freight, until it is landed upon such pier. And *all restraints* by exactions *in the form of taxes upon such transportation, or upon acts necessary to its completion*, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States." (Italics ours)

The principle of the above case was followed in *Rhodes v. Iowa*, 170 U. S. 412. An Iowa statute provided a penalty for transportation of intoxicating liquor from one point to another in the state. A shipment was made from Illinois to a point in Iowa on a through bill of lading. On its arrival the station agent of the railroad company moved the box from *the platform* into a *freight warehouse*. The court, in reversing the conviction of the station agent, said (p. 426):

"It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in *moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation*, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below is, therefore, reversed." (Italics ours)

In *Whitfield v. Ohio*, 297 U. S. 431, at page 439,

this court, recognizing the rules of the above cases, said:

> "* * * The interstate transaction in its fundamental aspect ends upon delivery to the consignee."

The *continuity* or lack of continuity of the movement of cargo determines its character as being in interstate or foreign commerce on the one hand, or in intra-state commerce on the other. If in the latter category it is subject to state taxation. If in the former, it may not be taxed.

Carson Petroleum Co. v. Vial, 279 U. S. 95;
Pennsylvania Railroad v. P. U. Commission, 298 U. S. 170.

A change in the mode of transportation from the vessel to a stevedore's truck does not break the continuity of the movement.

Hughes v. Minnesota, 272 U. S. 469.

Whether stevedoring costs are entirely absorbed by the vessel or are in part passed on to the shipper or consignee is immaterial in determining whether stevedoring is interstate or foreign commerce.

United States v. Erie, 280 U. S. 98.

The admitted facts clearly demonstrate that stevedoring is an essential and component part of and link in the chain of interstate and foreign commerce. When stevedoring is performed by a ship owner for his own vessels neither appellees nor the court below deny that it is a part of interstate and foreign commerce and beyond the regulatory or taxing powers of the state.

In *Luckenbach v. Denney*, 152 Wash. 548, 278 Pac.

419, the Supreme Court of the State of Washington, in a case involving an attempt on the part of the State of Washington to regulate the business of operating a dock used by an interstate carrier in loading, discharging and handling cargoes to and from its own ships, said (p. 557):

> "It is fundamental that the authority to regulate and control interstate commerce cannot be divided and that the authority of the United States is absolute."

And at page 558:

> "Under the conditions existing in this case, one of the '*component parts*' of the interstate commerce conducted by respondent is handling goods upon its own dock when carried in interstate commerce." (Italics ours)

The right of the state to regulate such dock operations was denied.

It will be noticed that the operation of a dock and the handling of cargo on a dock are one step *further removed* from commerce than are most of the stevedoring operations here under consideration.

Appellees contended below, and the court below found, that a different rule exists where stevedoring is performed by an *independent local* agency, such as appellant.

B. The Opinion of the Court Below

The court below said:

> "Appellant argues that as it actually participates in the movement of interstate and foreign commerce and as the tax is upon the gross re-

ceipts from such commerce, it is a direct tax upon every ton of cargo moved and, hence, is unconstitutional according to *McCall v. California*, 136 U. S. 104; *Texas Transport & Terminal Co. v. New Orleans*, 264 U. S. 150, and *Di Santo v. Pennsylvania*, 273 U. S. 34. Without detailing the facts of these three cases it is noted that each involves the imposition of a *license* tax directly upon the *carrier* of interstate and foreign commerce * * *." (Italics ours) (R. 25).

This statement implies that there was a difference in the *nature of the tax* involved in the three cases cited and the tax here under discussion. *This is not the fact.* A license tax for *revenue* and an occupation tax are essentially the same. It is only when a license tax is imposed for *regulation* and not, primarily, for *revenue* that a difference need be recognized.

Royall v. Virginia, 116 U. S. 572, 579;
Cooley, Taxation, 4th Ed., §1675.

For example, in the Business and Occupation Tax here involved, Chapter 191, Laws of Washington 1933, Section 3, provides for a *license;* Section 23 forbids any person to fail or refuse to obtain the *license;* Chapter 180, Laws of Washington 1935, Section 187, provides for a *registration certificate*, and Section 203 imposes a penalty when any one engages in business without having obtained such a *registration certificate.*

In *McCall v. California*, 136 U. S. 104, and *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, the licenses mentioned, like the Washington license, or reg-

istration certificate, were merely receipts for the tax, not a part of a system of *regulation.*

Royall v. Virginia, supra.

Di Santo v. Pennsylvania, 273 U. S. 34, alone of the three cases involved *regulation.*

Again the tax was no more *on the carrier* in the sense that it fell on the steamship companies employing the Texas Transport Co. or Di Santo than the instant tax is on the ship owner or ship master employing appellant. This will be shown more clearly in the subsequent discussion.

The instant tax does fall directly on a *carrier* as appellant is a connecting *carrier* fulfilling part of the interstate or foreign haul.

The court below again said:

> "* * * In this case the tax is not imposed upon, or because of the kind of business appellant is engaged in, but rather upon the act or privilege of engaging in business activities without regard to its kind or nature * * *."
>
> "Bearing in mind that the business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state * * *." (R. 25).

The fact that the Business and Occupation Tax of the State of Washington is a *general* revenue tax measure of that state, while a fact to be considered in determining the validity of the tax, has little or no direct bearing upon the issue here involved. The taxes

declared unconstitutional were of a general character in

Moran v. New Orleans, 112 U. S. 69;
McCall v. California, 136 U. S. 104;
Spalding v. Edwards, 262 U. S. 66;
Texas Transp. Co. v. New Orleans, 264 U. S. 150;
State v. Tampa, 266 U. S. 594;
Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650, *supra*.

In *State v. Tampa, supra*, the tax which was declared by this court to be unconstitutional, was imposed under the general provision of the Louisiana statute of 1920 which imposed a tax on any business with respect to which no provision had been expressly made.

The court below again said:

> "Bearing in mind * * * that appellant is a *domestic* corporation operating an *independent* business *entirely within this state* * * *." (R. 25)

That appellant is a domestic corporation is wholly immaterial in the present controversy. A state may not impose an unconstitutional tax even in the case of domestic corporations.

Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326 at page 342;
Ozark Pipe Line v. Monier, 266 U. S. 555, at 567.

That appellant's operations are conducted entirely in the State of Washington does not affect their interstate or foreign character.

The Daniel Ball, 10 Wall. 557;
Morrison Mill Co. v. Hartford Fire Ins., 32 F. (2d) 271; aff. 35 F. (2d) 862;
Foster v. Davenport, 22 How. 244;
Moran v. New Orleans, 112 U. S. 69;
Harman v. Chicago, 147 U. S. 396;
United States v. Great Lakes, 208 Fed. 733;
People v. Miller, 178 N. Y. 194, 70 N. E. 472;
Texas Transp. Co. v. New Orleans, 264 U. S. 150, *supra;*
State v. Tampa Interocean Co., 266 U. S. 594, *supra;*
Di Santo v. Pennsylvania, 273 U. S. 34;
Fishers Blend Station v. State Tax Commission, 182 Wash. 163, 45 P. (2d) 942, reversed 297 U. S. 650, *supra;*
State v. Murray, 26 Ala. App. 90, 153 So. 667;
United States v. California, 297 U. S. 175.

The court below again said:

"Bearing in mind * * * that the tax is not upon imports, exports or interstate or foreign commerce and that appellant is not a necessary factor in such commerce but has built up and renders an independent service which is advantageous to those who actually form a necessary and component part or link in such commerce, it is inconceivable that the imposition of such an excise conflicts or is inconsistent with any federal or state constitutional provision." (R. 25)

State regulation and taxation were found to be

unconstitutional under similar circumstances in the following cases:

Foster v. Davenport, 22 How. 244, *supra;*
Moran v. New Orleans, 112 U. S. 69, *supra;*
People v. Miller, 178 N. Y. 194, 70 N. E. 472, *supra;*
Texas Transp. Co. v. New Orleans, 264 U. S. 150, *supra;*
State v. Tampa Interocean Co., 266 U. S. 594, *supra;*
Di Santo v. Pennsylvania, 273 U. S. 34, *supra;*
State v. Murray, 26 Ala. App. 90, 153 So. 667, *supra.*

In *Foster v. Davenport, supra*, the State of Alabama enacted a statute imposing certain regulations on steamboats navigating the waters of the State. The Act had been found unconstitutional as applied to vessels engaged in interstate and foreign commerce, but it was urged that a steamboat exclusively engaged in lightering goods from and to vessels anchored in Mobile Bay, in the State of Alabama, and in towing vessels from the City to the Bay and, on occasion, out into the Gulf, was engaged in domestic commerce and thus subject to state regulation. This court said (p. 246):

> "It is quite apparent, from the facts admitted in the case, that this steamboat was employed *in aid of vessels engaged in the foreign or coastwise trade* and commerce of the United States, either in the delivery of their cargoes, or in towing the

vessels themselves to the Port of Mobile. The character of navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. * * *" (Italics ours)

State regulation was forbidden. The vessel involved was apparently locally owned and independently operated. It apparently had no connection whatsoever with the vessels it lightered or towed except to perform the service.

The same rule was followed in *Moran v. New Orleans, supra,* involving a *license tax for revenue* of the City of New Orleans imposed upon tow boats towing vessels between the City of New Orleans and the Gulf of Mexico. The facts were similar to those in *Foster v. Davenport, supra,* and state *taxation* was forbidden. Here again, the towboats appear to have been independently locally owned and operated.

In *People v. Miller, supra,* the State of New York attempted to impose a tax upon the gross receipts of a domestic corporation incorporated as a railroad company, but which in fact conducted a limited local operation described in the opinion as follows (p. 473):

"* * * The *entire business* is transacted in Buffalo, and *consists in loading and unloading* and storing grain and other freights, which, on the one hand, *come from places outside of the state and are destined for points in the state or elsewhere,* and, on the other, which come from points in the state and are destined to places in other states. It handles *no local freight* whatever. All

its receipts are from such business, and come from the payment to it by the several companies or carriers who employ it of fixed charges per bushel on the grain handled and a fixed rate per ton on the package freight, which charges include elevator service and the use of the yards for car storage and car service over its tracks. These charges also cover a 10 days' storage privilege, and for freights remaining longer than that an additional storage charge is made * * *." (Italics ours)

The court continued the description of the taxpayer's business by emphasizing the following (p. 473):

"* * * Its principal business operations consist in the trans-shipment of grain which it takes into its elevator from boats or water craft upon the river or land and discharges into cars to be carried by railroads to New York and other ports on the Atlantic seaboard. In this way it moves the freight or property, whatever it may consist of, about 500 feet, and only that part of the route is covered by the relator's operations, whether the freight is destined for the East or the West. *It may be assumed from the nature of the business that the property is carried under bills of lading from the point of shipment to the point of ultimate destination, and the relator is employed by the carriers to aid in the transportation of the property at Buffalo.*" (Italics ours)

The tax was held unconstitutional although the domestic corporation was conducting a wholly independ-

ent business entirely in one state but forming a link in the through transportation of goods.

As indicated above (p. 21) two leading decisions, *Texas Transp. Co. v. New Orleans*, *supra*, and *Di Santo v. Pennsylvania*. *supra*, each having a direct bearing on the issues here involved, were brushed aside by the lower court in language showing an utter misconception of the holding in each.

In *City of New Orleans v. Texas Transp. Co.*, 152 La. 497, 93 So. 751, an ordinance of the City of New Orleans imposed a tax for *revenue* upon "every business, trade or occupation that is subject to taxation." The tax upon steamship agents was graded according to annual *gross* receipts. The tax was $400.00 if such receipts equalled $100,000.00 or more annually. The receipts of the Texas Transport Co. exceeded that amount and its annual tax was thus *fixed* at $400.00. While the company had several offices, its local business at New Orleans was all that was involved in the tax proceeding. Its local business was entirely confined to dealings "with ship owners, charterers and operators of vessels in interstate and foreign commerce." It had four regular patrons, by way of steamship companies, under contract who each paid a commission based on gross freights collected by the company for their respective vessels. The company occasionally handled the business of isolated tankers or tramp ships on a lump sum basis. The company did not own, charter or operate ships or have any interlocking arrangements with its patrons for pooling or sharing earnings, gains or losses. The company performed for their patrons the numerous cus-

tomary duties of a steamship agent which included solicitation of cargo, acceptance of cargo on the wharf, "arranging with stevedores for discharging and loading cargo," issuance of bills of lading, payments of disbursements, handling immigration matters, etc., etc. The Louisiana court, in upholding the imposition of the tax, in a carefully considered opinion, said in part (p. 752):

> "The business of steamship agents is an extensive business in New Orleans, as it is in every large seaport. As a separate or an *independent business*, it is a result of the development of the country's commerce with foreign nations and among the several states, in the early days, when time was not so much the object or subject of economy as it is today, *every ship's captain, for his own ship, discharged the duties and rendered the services* for which *local steamship agents* are employed nowadays. But it would be impracticable now for a ship's captain to remain with his ship in port long enough to attend to the many matters which the local steamship agents can and do attend to for a ship at sea or in a foreign port. The business of steamship agents is therefore a *necessary adjunct* to commerce on the high seas." (Italics ours)

The Louisiana court recognized that in *McCall v. California*, 136 U. S. 104, this court held that an employee of an interstate railroad company soliciting passenger traffic could not be subjected to a license tax for revenue. The Louisiana Court then attempted to distinguish this rule in so far as the Texas Transport

and Terminal Company was involved as follows (p. 752):

"The important and distinguishing feature of this case is that the business of the defendant company, *however necessary as an adjunct* to the interstate and foreign commerce of the steamship lines, is not a part of it. A tax on the business of the steamship agent *does not increase the expense or reduce the profit* of any steamship company's business. The tax is therefore not a direct hindrance or regulation of the interstate or foreign commerce of the steamship lines. If the steamship *agent were employed at a salary*, by a steamship company engaged in interstate or foreign commerce, a license tax imposed upon the local business of the steamship agent would be a tax upon the business of his principal. If, under any other arrangement between the steamship agent and his patrons, the tax imposed upon the local business done by the steamship agent *would be reflected in the expense account*, and ultimately in the profit and loss account, *of the interstate or foreign commerce of his patrons*, the tax would be a direct hindrance to their interstate or foreign commerce. But the fact that the *local business* of the steamship agents in this port and the interstate and foreign commerce of the steamship lines *are dependent* upon each other *does not make a tax upon the local business* of the steamship agents a tax upon the interstate or foreign commerce of the steamship lines. The reason is that, if the tax upon the local business

of the steamship agents affects the interstate or foreign commerce of the steamship lines at all, it does so only remotely." (Italics ours)

The Louisiana tax was upheld by the two lower courts and rehearing in the Supreme Court of the state was denied by the "Whole Court." When the case reached this court the holdings of the lower courts were reversed in *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, and the imposition of the tax forbidden. The facts in *Texas Transp. Co. v. New Orleans* are strikingly similar to those here involved with the added feature that the present case is a far stronger case for the unconstitutionality of the Washington tax for two reasons:

(a) The New Orleans ordinance placed a top limit of $400.00 upon the tax. The Washington Business and Occupation Tax has no limits. It increases indefinitely with every ton of cargo handled by appellant.

(b) Many services performed by the Texas Transport Company were somewhat removed from actual transportation and might be considered only indirect elements of interstate and foreign commerce. *Appellant's operations are wholly limited to the immediate transportation of goods then moving in interstate and foreign commerce.*

In comparing the two cases the following similarities are at once apparent:

1. The Louisiana tax was a *general revenue measure* imposed upon and measured by *gross receipts.* So is the Washington tax.

2. The Texas Transport Company was a wholly *in-*

dependent local concern employed by interstate and foreign carriers to perform a local operation of shipping. The same is true of appellant.

3. The patrons of the Texas Transport Company could have installed their own offices and performed the work with their own employees. They chose however to employ a local independent company to do this work. The same is true in the instant case.

4. The services performed for a vessel by the Texas Transport Company in earlier days would have been performed by the crew of the vessel. This is likewise true of appellant's work. We submit the case is controlling.

In so far as appellant's third method of "arranging" for stevedoring is concerned, the case is conclusive.

In Di Santo v. Pennsylvania, 285 Pa. 1, 131 Atl. 489, the State of Pennsylvania had passed an act providing that no person other than railroad or steamship companies *and their agents* should engage in the sale of steamship tickets without a license. The act was aimed at curing abuses which had resulted in the defrauding of aliens and others who were often the subjects of overreaching. The object of the legislation appeared wholly commendable. Di Santo sold tickets at his own home for four steamship companies. There he received the usual advertising matter, sailing dates and ticket books from the steamship companies. There he conducted his business. His home did not bear any company name; he apparently operated it entirely at his own expense. It was first urged in the Pennsylvania court that Di

Santo was an *agent* of the steamship companies and therefore was within the exception to the provisions of the act which exempted steamship *agents* from the operation of the act. The court, however, found that he was not an *agent* or *employee* of the carrier but was a free lance or wholly *independent* operator and as such must comply. It was then urged that the application of the Pennsylvania Act would impose a burden on interstate and foreign commerce. The Pennsylvania court attempted to distinguish *McCall v. California, supra,* and *Texas Transp. Co. v. New Orleans, supra,* by stating that in the first case McCall was an *individual agent* of the interstate carrier and therefore his taxation was forbidden. The court then found that Texas Transport Co. was a *corporate agent* whose taxation was equally forbidden. The Pennsylvania court then found that Di Santo fell in an entirely different category. He was not an *agent,* individual or corporate. He was a *wholly independent local* free lance, conducting *his own business* free from interference or direction of his principal. The Pennsylvania court held that the regulation of his local independent business was not a burden on interstate of foreign commerce and that in any event such regulation was permissible under the general police power of the state. The decision of the Pennsylvania court upholding the legislation was reversed in *Di Santo v. Pennsylvania,* 273 U. S. 34. This court said (p. 37):

> "The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers *and*

operated by their servants and employees. The license fees and other things imposed by the act on plaintiff in error who initiates for his principal a transaction in foreign commerce constitute a direct burden on that commerce." (Italics ours)

The instant case is a far stronger case for the unconstitutionality of the Washington Business and Occupation Tax than the Pennsylvania case discussed above.

1. The Pennsylvania act might well have been considered a proper exercise of the police power of the state. No such question is here presented.

2. The requirements of the Pennsylvania act were relatively simple and the license was limited to a fee of $50.00 annually. The Washington tax has no limit and increases with every ton of cargo handled.

As a *practical matter* the requirements of the Pennsylvania act, as imposed upon a free lance solicitor of passenger traffic, are negligible in their effect on interstate and foreign commerce as compared to the gross receipts tax here involved which must be paid on each ton of cargo handled by appellant. Appellant's connection with interstate and foreign commerce is infinitely closer and more direct than that of Di Santo.

The two foregoing cases have thus conclusively settled the rule that a state may not impose a direct burden on an independent local business which constitutes an essential link in and component part of interstate and foreign commerce. The reason for the rule is, we believe, clear.

Commerce by water may be conducted by what might be termed an *integrated* operation. Here, employees of the water carrier perform each function including solicitation of cargo and passengers, collection and receipt of cargo, loading of same aboard the vessel, transporting same, discharging cargo from the vessel, delivering it to the consignee, and all the other incidental operations necessary to water transportation. It is undisputed that the gross receipts of such a water carrier derived solely from its operations in interstate and foreign commerce may not be taxed by the state. A direct tax upon such gross receipts is a direct regulation of interstate and foreign commerce and so forbidden by the Commerce Clause of the Federal Constitution.

Philadelphia S. S. Co. v. Pennsylvania, 122 U. S. 326.

Commerce by water, on the other hand, may be performed by the coordinated action of several wholly independent agencies, whose united activities constitute the through interstate or foreign movement.

The water carrier may be a smaller concern and thus unable to equip and maintain the elaborate local facilities which a larger company finds more efficient and economical. In this non-integrated operation a steamship agency may solicit, collect and receive the cargo and passengers. A local stevedoring company may load it aboard the vessel and at destination a local stevedoring company many discharge the cargo from the vessel and a local steamship agency arrange for its delivery to the consignee. Each independent operation is necessary

to the fulfillment of the interstate or foreign movement.

Commerce by water carried on by several independent agencies linked together in a non-integrated operation is entirely dependent upon the success and continued operation of each participant in the operation. A tax on the gross receipts of any independent, necessary participant in a movement in interstate and foreign commerce is a burden on the entire movement which can be no stronger than each component participant. If a state may hinder and obstruct, by regulation, taxation or otherwise, any step in the non-integrated operation, the whole movement is hindered and obstructed in like degree. This is admitted by Exhibit A, attached to the complaint (R. 8).

Appellant is a connecting carrier physically performing a part of the interstate and foreign haul. Appellant's receipts are entirely derived from transporting cargoes at the time moving continuously in interstate and foreign commerce. It is a carrier in interstate and foreign commerce.

United States v. California, 297 U. S. 175.

The state may tax property, real or personal, tangible or intangible, by a nondiscriminatory *ad valorem* tax even though used exclusively in interstate or foreign commerce.

Virginia v. Imperial Coal Co., 293 U. S. 15.

A state may impose upon a domestic corporation for the privilege of exercising its franchise a tax

measured by *net income* even though derived from interstate and foreign commerce.

Matson Navigation Co v. State Board, 297 U. S. 441.

A state may impose a privilege tax on gross receipts derived from the intrastate business of a corporation engaged in both interstate and intrastate commerce, although the effect may be indirectly to burden interstate commerce.

Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U. S. 403.

The state, however, under the unanimous decisions of this court may not impose the Washington Business and Occupation Tax upon the *gross receipts* derived by appellant *solely* from *interstate* or *foreign* commerce.

C. Cases Cited by Court Below

The court below cites as authority for its decision *Ficklen v. Shelby County*, 145 U. S. 1. The discussion of this case in *Texas Transp. Co. v. New Orleans*, 264 U. S. 150, at pages 153-154, sufficiently distinguishes the *Ficklen* case. See also:

Stockard v. Morgan, 185 U. S. 27, 34;

Crew Levick v. Pennsylvania, 245 U. S. 292, 296;

Jaybird Mining Co. v. Weir, 271 U. S. 609, 620;

Di Santo v. Pennsylvania, 273 U. S. 34, 43;

Burnet v. Coronado, 285 U. S. 393, 408.

The established rule of this court is exactly contrary to that urged by the Supreme Court of the State of Washington for which it cites the case of

Ficklen v. Shelby County, 145 U. S. 1, *supra*, as authority.

In *Stockard v. Morgan*, 185 U. S. 27, the complainants were residents of Tennessee. They represented non-resident parties in soliciting orders for goods from jobbers in Tennessee. When the orders were obtained they were forwarded to their non-resident principals. If the order was accepted the goods were shipped to the local jobbers. The business of the complainants was *physically* of a local character but they were performing a function which was essential to an interstate or foreign movement. The complainants apparently conducted an independent local business, receiving a commission when they performed services. The court emphasized that it was wholly immaterial that the complainants acted for more than one patron. The court said, significantly (p. 37):

> "Although it is said in the opinion of the state court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is in effect a tax upon interstate commerce, and that fact is not in any wise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. * * *
>
> "Although the State has general power to tax

individuals and property within its jurisdiction, yet it has no power to tax interstate commerce, even in the person of a resident of the State."

The theory of the court below was urged by the Circuit Court of Appeals of the Ninth Circuit in *Real Silk Hosiery Mills v. City of Portland*, 297 Fed. 897, at page 901, where the court said, in upholding a city ordinance of Portland, Oregon, imposing a general license tax on solicitors:

> "Can it be said, upon this state of facts, that the plaintiff's business in interstate commerce is subject to a burden because its *independent* solicitor, doing business in the city of Portland, as a solicitor, is required to pay a license tax and give a bond conditioned with respect to the faithful discharge of his obligations in carrying on that business?"

The same court further said (p. 903):

> "These cases, and others that might be cited, make it sufficiently plain that the freedom of interstate commerce has been judicially limited in its supposed conflict with the police power of the state to such burdens as pertain directly *to the movement of commerce* among the several states, and not to regulations governing *local business within the state*, preliminary or subsequent thereto, and does not prohibit the state by general law or local ordinance from legislating for the general welfare of the public within the state, or provide proper regulations for safeguarding the public interests or for the protection of

the public against fraud and deception, notwithstanding such legislation or regulation may indirectly affect interstate commerce." (Italics ours)

Although imposed under the police power of the state the ordinance was declared invalid by this court in *Real Silk Mills v. City of Portland*, 268 U. S. 325. The *physically local* character of the business of the independent solicitors of the Real Silk Hosiery Mills was found to be immaterial as they were performing an essential function in interstate and foreign commerce and any burden upon their operations was found to be a burden upon interstate and foreign commerce.

The court below cites:

Hump Hairpin Co. v. Emmerson, 258 U. S. 290;

Pacific Telephone v. Tax Commission, 297 U. S. 403.

They are both cases involving a taxpayer who was engaged in *both* intrastate and interstate commerce. This court upheld, in the first case, a non-discriminatory state law imposing a privilege tax based upon capital stock actually represented by property located in and business *transacted within the state* imposing the tax. In the second case, this court upheld the imposition of the same tax here involved upon the gross receipts of a telephone company derived from intrastate commerce, holding that the burden, if any, upon the interstate business of the telephone company under such circumstances were too remote to be con-

sidered. Neither case is in point in the present discussion.

Appellant is either wholly engaged in intrastate commerce and all its gross receipts taxable or appellant is wholly engaged in interstate commerce and the imposition of the tax unconstitutional. Appellant's operations fall within one category or the other.

II. IMPOSITION OF THE TAX DENIES APPELLANT THE EQUAL PROTECTION OF THE LAWS

The provisions of the Fourteenth Amendment to the Constitution of the United States forbidding a denial of the equal protection of the laws is an easy prohibition to define, but difficult to apply. In *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, a law of Pennsylvania created a gross receipts tax which was laid on foreign and domestic corporations engaged in the local cab business. The tax did not apply to individuals or partnerships in the same business. This court held that the statute violated the equal protection clause of the Fourteenth Amendment to the Federal Constitution, as the classification for taxation of corporations on the one hand, and individuals and partnerships on the other, in the particular case, was a distinction without a difference.

In *Colgate v. Harvey*, 296 U. S. 404, the court stated (p. 423):

> "* * * The classification, in order to avoid the constitutional prohibition, must be founded

upon pertinent and real differences, as distinguished from irrelevant and artificial ones."

In the instant case the classification is wholly unreasonable and arbitrary and without any actual basis.

A carrier conducting an integrated operation and stevedoring its own vessels pays no Business and Occupation Tax to the State of Washington. The court below holds that appellant, constituting a participant in a non-integrated movement of cargo and performing identically the same work for the vessel of another, is subject to the tax. It must be borne in mind at all times that the *integrated operation* and the *non-integrated operation* are competitors and a substantial tax on a participant in one operation necessarily weakens that operation to the advantage of its competitor.

This court in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, *supra*, said, at page 402:

> "* * * The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not."

So in the instant case, if a corporation owns or operates the vessel it stevedores, it pays no tax, otherwise it does.

The inequality of the above graphically illustrates the fallacy of the ruling of the court below. If stevedoring is a component part of and an essential link in interstate or foreign commerce when performed by a water carrier for its own vessels, it is neces-

sarily a component part of and essential link in interstate and foreign commerce when performed by appellant. The necessity for the work and the character of the work is exactly the same in either case. Its relation to the movement of goods in interstate and foreign commerce is identically the same.

CONCLUSION

From the foregoing we respectfully submit that the imposition of the Business and Occupation Tax of the State of Washington upon the operations of appellant violates Article I, Section 8, Clause 3 of the Constitution of the United States, and that the imposition of the tax likewise denies to appellant the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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APPENDIX I

Chapter 191, Laws of Washington, 1933

AN ACT relating to taxation; imposing taxes upon the privilege of engaging in business activities * * *.

Section 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term "gross income" means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses: Provided, The term "gross income" shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

(7) The word "business" shall include all activities engaged in with the object of gain, benefit or advantage either direct or indirect, and not excepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activies shall be considered business engaged in taxable in the class in which it falls.

* * * * * * * * *

Sec. 2. (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from

every person an *annual tax or excise for the privilege of engaging in business activities.* Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows: (Italics ours)

* * * * * * * * *

(f) (General section imposing tax of six-tenths of one per cent on businesses *not enumerated, vetoed.*)

* * * * * * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a *privilege tax* is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington *a license under this act to engage in and to conduct such business or perform such function* for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function. (Italics ours)

* * * * * * * * *

Sec. 5. In computing the amount of any tax * * *, there shall be excepted from gross proceeds of sales or gross income so much thereof as is derived * * * from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States * * *

* * * * * * * * *

Sec. 13. * * * No restraining order or injunction shall be granted or issued by any court * * *, except upon the ground that the assessment thereof

was in violation of the constitution of the United States or that of the State of Washington.

* * * * * * * * * *

Sec. 17. Any person against whom a tax shall have been imposed as herein provided may be restrained and enjoined, * * * from engaging and/or continuing in any business for which a privilege tax is required by the provisions of this act, until such tax shall have been paid and/or until such person shall have complied with the provisions of this act.

* * * * * * * * * *

Sec. 23. It shall be unlawful for any person to fail or refuse to obtain *the license* * * *. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * *

Sec. 24. The administration of this act shall be vested in and exercised by the tax commission which shall prescribe forms and rules, etc. * * *

Chapter 57, Laws of Washington Extraordinary Session, 1933

Section 1. That chapter 191 of the Laws of 1933 be, and the same hereby is, amended by adding thereto a new section, to be known as section 2-a, to read as follows:

Section 2-a. (1) From and after the first day of January, 1934, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person engaging or continuing within this state in the business of rendering or performing services, professional or otherwise, and from *every person*

engaging or continuing within this state in any business not specifically taxable under section 2 of this act, *an annual tax or excise* for the *privilege of engaging* in such business; as to such persons the amount of the tax or excise shall be equal to the gross income of the business multiplied by the rate of five-tenths of one per cent; * * *. (Italics ours)

Chapter 180, Laws of Washington, 1935

AN ACT relating to revenue and taxation; providing for the levy and collection of a tax or excise upon the act or privilege of engaging in business activities; * * *.

Sec. 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person *a tax for the act or privilege of engaging in business activities.* Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: (Italics ours)

* * * * * * * * *

(e) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof, persons engaged in the following businesses (whether or not title to materials used in the per-

formance of such businesses passes to another by accession, confusion or other than by outright sale); repairing, personal, business, professional, mechanical and educational service businesses; abstract and title, insurance, financial, brokerage, construction contracting and sub-contracting, advertising and hotel businesses.

Sec. 5. For the purpose of this title, unless otherwise required by the context:

* * * * * * * * *

(g) The term "gross income of the business" means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses;

* * * * * * * * *

(m) The word "business" includes all activities engaged in with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly;

* * * * * * * * *

Sec. 12. In computing tax there may be deducted from the measure of tax the following items:

* * * * * * *

(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

* * * * * * * * * *

Sec. 187. If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall * * * apply for and obtain from the commission, upon the payment of a fee of one dollar, *a registration certificate* for each calendar year, or portion thereof. Said registration certificate shall be personal and non-transferable and shall expire on the last day of the calendar year for which issued and shall be renewed annually upon the condition that the taxpayer shall pay the aforesaid registration fee *and the tax accrued to the state under the provisions of this act.* * * * No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section.

* * * * * * * * * *

Sec. 198. * * * No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty imposed by this act, or any part thereof, except upon the ground that the assessment thereof was in violation of the constitution of the United States or that of the State of Washington.

* * * * * * * * * *

Sec. 202. If any tax, increase or penalty imposed by this act, or any portion of such tax, increase or penalty is not paid within fifteen days * * *, the

tax commission shall issue a warrant * * * to the sheriff * * *, commanding him to levy upon and sell the real and/or personal property of the taxpayer found within his county * * *. If any warrant issued under this section is not paid within thirty days after the same has been filed with the clerk of the superior court, the tax commission may by order issued under its official seal, *revoke the certificate of registration* of the taxpayer * * *. (Italics Ours)

* * * * * * * * *

Sec. 207. It shall be *unlawful* for any person *to engage in business without* having obtained a *certificate of registration* as provided herein; or to *engage* in business *after* his *certificate* of registration shall have been *revoked* by order of the tax commission; * * * or for the president, vice-president, secretary, treasurer or other officer of any company to carry on the business of any company which has not obtained a certificate of registration or whose certificate of registration has been revoked by order of the tax commission * * *. Any person violating any of the provisions of this section shall be guilty of a gross misdemeanor and punishable in the manner provided by law. * * * (Italics Ours)

* * * * * * *

Sec. 216. No tax shall be imposed under the provisions of chapter 191, Laws of 1933, as amended by chapter 57, Laws of 1933, Extraordinary Session, with respect to the period beginning May 1, 1935, and ending July 31, 1935, and the provisions of such act shall be deemed amended in conformity herewith.

Nothing contained in this section shall affect the liability of any person subject to the provisions of said chapter 191, as amended, for the payment of tax imposed thereunder for any period prior to May 1, 1935, and no action or proceeding for the collection of tax, lien or claim for tax or action involving the validity of tax imposed under the provisions of said act shall be affected hereby and all remedies for the assessment and collection of taxes, penalties and interest under the provisions of said act shall be and remain in effect until such time as all taxes imposed thereunder shall have been paid or collected.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1937

No. 68

PUGET SOUND STEVEDORING COMPANY,
Appellant,

v.

THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

G. W. HAMILTON,
Attorney General,

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IN THE

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THE TAX COMMISSION OF THE STATE OF WASHINGTON, and HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Members of said Commission,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

Appellant unsuccessfully sought to enjoin collection of the Washington business tax (Chap. 191, Laws of 1933, as amended by Chap. 57, Laws Ex. Sess., 1933, and Chap. 180, Laws of 1935) as imposed upon the local business conducted by apellant as a "contracting stevedore" (R. 2).

The objection to the tax was that its imposition would deny appellant equal protection of the law, and

would be a prohibited burden upon interstate commerce (R. 2).

The trial court rejected both contentions and dismissed the action (R. 10).

On appeal to the Supreme Court of the State of Washington the judgment of the lower court was affirmed, the opinion being based upon the fact that appellant's business was that of rendering an independent service to carriers engaged in interstate commerce but was not itself interstate commerce (R. 25).

STATEMENT OF THE CASE

Appellant described itself in its complaint below as "an independent contractor" (Par. 6, R. 2).

The entire record shows that appellant is engaged in the business of performing contracts to load or unload ships for specified charges, the method and manner of doing the work being entirely at the option of appellant, and appellant not representing in any way either the carrier, the shipper of the goods, or the persons to whom the goods are consigned.

While it is admitted in the pleading below that appellant is an independent contractor (R. 2) and while the case was tried on that basis counsel sought on appeal to the Supreme Court of the state to argue that appellant was not an independent contractor, but was itself a carrier. That contention is maintained here although the fact was found otherwise by both the trial and appellate courts of the state (appellant's brief, p. 35).

It is respondent's contention, and the finding of the trial and supreme courts, that appellant had built up a local business of rendering services under contract, which business, while it may have been helpful to commerce, was not itself commerce, and that, therefore, a tax on that business was not a tax on the gross proceeds of interstate commerce.

ARGUMENT

Appellant Transacts a Local Business Independent of Interstate Commerce

Counsel for appellant, in the trial court, made the correct distinction between a local business conducted by one who contracts with interstate carriers, which business is taxable, and the business conducted by the interstate carrier, which is interstate commerce, which, of course, is not taxable by the state.

In this court counsel seek to avoid this distinction by ignoring the fact that appellant's business is entirely independent of interstate commerce, and claiming that since appellant's services are rendered to those who do engage in interstate commerce and in connection with goods moving continuously in interstate commerce, appellant should have the same exemption from taxation as enjoyed by an interstate carrier loading or unloading its own vessels.

At the outset it must be remembered that a ship owner will employ the services of an independent contractor such as appellant when that is the most efficient and economical method (R. 4, 5, and appellant's brief, p. 6).

It follows, therefore, that the imposition of a valid state tax on the business conducted by the contracting stevedore is no burden whatever on the ship owner, the carrier, or the consignee, in short, is no burden on interstate commerce.

In the vast majority of cases appellant's contract provides that it shall perform all services in connection

with the loading or unloading of the vessel with its own men, using its own methods, under a form of contract appearing in the record, pages 14 to 17, inclusive.

It is the proceeds realized from the performance of such contracts that the Washington State Occupation Tax is levied upon.

But in a very few instances appellant acts simply as an employment agent, furnishing laborers to the ship owners, whose laborers thereafter work under the master of the ship.

Whether appellant performs his contract by loading or unloading the ship, or by furnishing the labor, it performs its contract in its own way, the ship owner being concerned only with the accomplished result.

In either event, appellant is an independent contractor. In *Cory Bros. & Co. v. United States*, 51 Fed. (2d) 1010, the court said, in referring to the contract between ship owner and a stevedoring company:

"* * * Whether it be interpreted as employing appellant to engage others to do the stevedoring in discharging the flour or to perform the stevedoring service itself makes no difference; in either case appellant is an independent contractor. *The Satilla*, 235 F. 58 (C. C. A. 2); *The Robert R.*, 255 F. 37 (C. C. A. 2); *Soderberg v. Atlantic Lighterage Corp.*, 19 F. (2d) 286, 288 (C. C. A. 2). * * *"

Appellant operates under contract similar to the one involved in *The Satilla*, 235 F. 58, under which the steamship company may give orders as to when and where to load or discharge vessels, but under which it may not direct the manner of doing the work, which is left entirely to the contracting stevedore. It is submitted that appellant is, therefore, an independent contractor.

In *The Richelieu*, 27 Fed. (2d) 960, the court said:

"* * * In short, it is well established that an independent contracting stevedore, such as the Baltimore & Ohio Railroad Company in the present case, is responsible for the selection and proper use of the labor and equipment which it employs, even when that equipment is supplied by the vessel itself, and so the officers of the vessel owe it no duty of supervision. (Cases cited.) * * * *"

There can be no question that in performing its contracts to load or unload ships for various carriers, appellant does so as an independent contractor.

The Teno, 47 Fed. (2d) 197;
Cornec v. B. & O. R. Co., 48 Fed. (2d) 497;
Soderberg v. Atlantic Lighterage Co., 19 Fed. (2d) 286;
The Robert R., 255 Fed. 37;
Jefferies v. De Hart, 102 Fed. 765.

The question has been passed on squarely by the Supreme Court of the State of Washington in *Lund v. Griffiths and Sprague Stevedoring Co.*, 108 Wash. 220. On page 229 this court, referring to the appellant stevedoring company, said:

"* * * The appellant was an independent contractor. *Its contract was entire. It undertook to load the boat employing its own means and its own servants.*" (Italics ours.)

In the case at bar, it is undisputed that appellant alone directs the workmen, and has entire control of the method and manner of doing the work.

The earnings of appellant sought to be reached by the Washington Business Tax are the earnings from the general business of stevedoring which appellant conducts with everyone desiring its services.

Unlike a carrier which performs its own services and receives its pay for the carriage or transportation of the commodities, appellant's remuneration involves no transportation; it is simply an agreed charge for a service rendered to one who does transport, and as we have pointed out, a charge which the carrier find is good business to pay.

That charge is not increased by the amount of this tax, and would not be decreased were appellant relieved from the necessity of paying the tax.

THE IMPOSITION OF THIS OCCUPATION TAX UPON APPELLANT DOES NOT DENY IT THE EQUAL PROTECTION OF THE LAWS

A consideration of appellant's second argument will emphasize the fact that appellant is in a local business distinguished from interstate commerce, and entirely independent from the businesses conducted by carriers with whom they contract.

The point sought to be made is that the tax in the case at bar would not be imposed upon a transportation company if the master unloaded his ship with his own sailors, but would be imposed upon the stevedoring company if the master entered into a contract with it, although the work performed by the sailors in the one case and the longshoremen in the other would be identical.

The answer to the argument is apparent and brief. The steamship company and the stevedoring company are not in competing businesses.

The steamship company remains in the transportation business, notwithstanding the fact that it unloads its

cargo with its own employees. Its receipts are the receipts from commerce, which may not be taxed.

The stevedoring company is engaged in the business of rendering services to that interstate commerce, but is not itself engaged in commerce. The stevedoring company realizes receipts from its business independent of the receipts from interstate commerce.

In order to avoid the very apparent difference between appellant's stevedoring business and the carrier's transportation business, counsel for appellant have coined two new phrases which have not been used before in this case.

He now seeks to refer to the business of a carrier which uses its own sailors to load and unload as an "Integrated Operation," and the joint business of a carrier and an independent stevedoring company as a "Non-integrated Operation."

No authority for such a characterization appears anywhere, and it is submitted that appellant's business must stand alone, and that counsel may not join it with the business of a carrier in order to compare the joint businesses with the single business of a carrier who does not employ an independent stevedoring company.

In no case would either of the transportation companies be taxed.

If there were authority for joining the independent stevedoring business with the transportation business conducted by a carrier with whom the independent stevedore contracts, the state would yet tax only the proceeds realized from the local stevedoring business as distinguished from the transportation business.

We have seen by appellant's own statement that the stevedoring business is not a competitor of any transportation business, unless the transportation company should hold itself out as rendering stevedoring services to other carriers and thus itself go into the stevedoring business, in which event the proceeds from the independent stevedoring business would probably be taxable by the state.

The case of *Luckenbach v. Denney,* 152 Wash. 548, relied upon by appellant, illustrates the point. In that case the Luckenbach Steamship Company leased and operated a pier in Seattle for the purpose of discharging and receiving freight from its own vessels. The court found:

"* * * *No vessels, other than its own, berth at or use that dock.* No freight was handled over the dock except such as was brought into this state from some other state by one of respondent's vessels, or such as was brought to th dock to be carried out of this state to some other state by one of its vessels. It maintained and operated the dock solely as an instrument of interstate commerce, and *in no way held itself out as a public wharfinger, nor does it perform wharfage service as a separate or independent service, nor perform any wharfage service nor collect any wharfage charge except pursuant to interstate contracts for carriers.* * * *"* (Italics ours.)

It was, of course, therefore held that the steamship company was not a public wharfinger, and was therefore not subject to state control.

The court went on to say that the handling of its own freight by a steamship company on its own pier, by its own employees, was a part of interstate commerce. But this does not aid appellant, for appellant handles no freight of its own. It is engaged in the general business

of rendering service to others. Had the Luckenbach Steamship Company held itself out as being willing to render services to others, it would then have been engaged in a local business, subject to local control.

The controlling fact was that the Luckenbach Steamship Company did not hold itself out as a public wharfinger nor did it perform wharfage services as an independent service. It was, therefore, impossible for it to collect for wharfage services.

In the case at bar, appellant does hold itself out as being in the general business of performing stevedoring services and does collect for performance of said services.

Only two cases are cited by appellant in support of its argument that the imposition of this tax would deny it equal protection of the laws.

The first is *Quaker City Cab Co. v. Pennsylvania,* 277 U. S. 389. That case involved the gross receipts tax levied on corporations engaged in operating taxi-cabs, but it was not imposed on either individuals or partnerships engaging in the identical business. The court said:

"In effect, section 23 divides those operating taxi-cabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. * * *" (Italics ours.)

It must be apparent that the situation of the stevedoring company and steamship company is quite different. The business transacted by each is of a different nature.

Appellant, as a contracting stevedore, receives money for rendering services, which is the business it transacts. Ship owners engage in interstate commerce, which is a different kind of business. So in *Colgate v. Harvey*, 296 U. S. 404, cited by appellant, there was a discrimination attempted between income derived from loans made within the state and income received from loans made without the state. In the case at bar, we have a business tax imposed without discrimination on all persons engaged in the same business.

Appellant is sought to be taxed under the general provision, section (e), title II, chapter 180, Laws of 1935, to be found on p. 510, which levied the tax on

"* * * *any business activity other than or in addition to those enumerated in subsections (a), (b), (c) and (d), above.* * * *" (Italics ours.)

It will be seen, therefore, that there can be no discrimination. If the steamship company itself should go into the general stevedoring business, it would be then taxed under the same clause.

A company cannot avoid payment of a tax on a taxable business by also engaging in a non-taxable business.

Pacific Telephone & Telegraph Co. v. Tax Commission, 56 Sup. Ct. 522.

In *Raley Bros. v. Richardson*, 264 U. S. 157, it was held that merchants engaged in domestic business in respect to which they are taxed, were not denied equal protection of the laws because certain merchants engaged in interstate business could not be taxed. The court said:

"* * * It would be a strange application of the equality provision of the Fourteenth Amendment to say

that because a State is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. *It is enough if the State observe the rule of equality among the persons subject to its taxing power.*" (Italics ours.)

Hart Refineries v. Harmon, 278 U. S. 499, is to the same effect.

It is submitted that there is a broad distinction between the business of rendering services to a transportation company and the business of the transportation company itself, so that a discrimination between the two, if the legislature had made one, would have to be sustained.

Quong Wing v. Kirkendall, 223 U. S. 59;
Central Lbr. Co. v. So. Dakota, 226 U. S. 157;
Alaska Fish Co. v. Smith, 255 U. S. 44.

THE IMPOSITION OF THIS BUSINESS TAX UPON APPELLANT IS NOT FORBIDDEN BY THE COMMERCE CLAUSE

For the first time, counsel for appellant flatly state their contention that appellant is a carrier (appellant's brief, p. 35).

This was not claimed below and is not a fact. Appellant is not engaged in interstate or foreign commerce, or indeed in any kind of commerce, but counsel seek to make applicable the reasoning in cases which do involve interstate commerce, such as *McCall v. California*, 136 U. S. 104; *Texas Transport Co. v. New Orleans*, 264 U. S. 150; and *Di Santo v. Pennsylvania*, 273 U. S. 34.

In all these cases the Supreme Court of the United States found that the tax was imposed directly upon the railroad or steamship company business, and indeed was

imposed, in each case, on interstate business, at its very source. It has always been held that the soliciting of interstate business is a part of interstate commerce.

In the *Texas Transport Company v. New Orleans* case, *supra,* a "ship's agent" was sought to be taxed, but the Supreme Court found that the ship's agent did not do a general business but confined itself, exclusively, to the interstate and foreign business of its principals. The business of the ship's agent was the business of the shipping company.

The Supreme Court found, as a matter of fact, that there was no relation of independent contractor. The relation was one of principal and agent. The agent's services consisted, among other things, in soliciting and engaging cargo, naming ships for carrying the cargo, arranging for the delivery of the cargo, issuing the bills of lading, arranging for stevedores, collecting freight charges and attending to all immigration matters.

In performing *each one of these acts, the* "agent" was speaking for and binding the master, which was the shipping company.

How different is the relation which exists between the stevedoring company, whose services might be engaged by such an agent. The stevedoring company has no control whatever over the shipping business, nor any right to speak for or represent the steamship company.

In the *Di Santo* case (273 U. S. 34), the court found that Di Santo was *an agent* for four steamship companies. He made contracts for them. He procured business for them and in so doing transacted their business, which constituted interstate commerce.

The court found that the case was governed by the *McCall* and *Texas Transport* cases, and that the tax was, in fact, imposed directly upon the business of interstate commerce.

It is true that there was a minority opinion in each case and that the minority believed, on the facts, that the agent was an independent contractor rather than an agent, but counsel can derive no comfort from this fact, for both the majority and minority opinions proceeded upon the assumption that an independent business would have been taxable by the state.

These cases in reality recognize the taxability of an independent contractor, such as appellant, who conducts a local business of rendering services as distinguished from interstate commerce.

Counsel also cite *State v. Tampa Interocean Steamship Company*, 96 So., p. 828, which is another case involving a steamship agent soliciting cargo and making contracts for and on behalf of his principals.

The Supreme Court of Louisiana found that the agent was conducting a separate business, but the Supreme Court of the United States reversed this finding (266 U. S., at p. 594) under the authority of the *Texas Transport* case, for it will be seen that once again the effect of the state tax would be to tax the steamship company itself.

Counsel have also cited *State v. Murray*, 153 So. 667, which is another case of the license tax on ship brokers. The court of appeals in Alabama, in this case, finding that the ship brokers solicited cargo for the steamship

company, correctly classified the case with *Texas Transport & Terminal Company* and held the tax invalid.

In each of these cases, which are the main reliance of appellant, the business of the steamship or railroad company itself was sought to be taxed.

Had the steamship agent in these cases been an independent contractor, conducting his own business instead of the business of the railroad company, that local independent business would have been taxable by the state.

Ficklen v. Shelby, 145 U. S. 1.

Counsel for appellant have attempted to avoid the *Ficklen* case by saying that its authority was limited in *Stockard v. Morgan*, 185 U. S. 27; but this case involved "agents" representing owners of property outside of the State of Tennessee, soliciting orders within the state for property to be thereafter charged to purchasers within the state.

It, of course, directly involved interstate commerce. Here again the agents soliciting orders represented others, and were not in business for themselves as is appellant in the case at bar.

The *Ficklen* case was distinguished (but by no means weakened) for it applies to cases where local individuals or corporations are engaged in business for themselves and are not mere employees of a non-resident employer.

The drummer cases are more nearly in point, for in these cases a drummer carrying his goods with him is engaged in a local business and is taxable by a state, not-

withstanding the fact that he received the goods in interstate commerce.

It must be apparent that the *Ficklen* case goes much further than the opinion of the State Supreme Court in the case at bar, for Ficklen was in the brokerage business, which business consists of representing others in the making of contracts and it might be argued that Ficklen was a mere agent of non-resident sellers or buyers, nothwithstanding the fact that his employment was not limited to one or any definite number of such non-resident employers. In the case at bar, appellant in no sense represents a foreign shipping company. *It makes contracts with the foreign shipping company and not for it.* Appellant's business is its own business—appellant's business is not interstate commerce at all and is, of course, taxable, whereas Ficklen's business might well have been argued to be the business of each foreign client Ficklen represented.

It was, of course, necessary for the Supreme Court of the United States to classify these cases according to their particular facts.

If a local independent business of rendering services to goods which happen to be in interstate commerce or to persons who happen to be engaged in interstate commerce is involved, the case of *Ficklen v. Shelby County,* 145 U. S. 1, applies, and that local independent business is taxable.

If, on the other hand, a shipping company transacts business through a local agent, the local agent is not engaged in business for himself, but is doing his employer's

business and the *McCall, Texas Transport* and *Di Santo* cases apply.

Counsel quote from *People v. Miller,* 178 N. Y. 194, 70 N. E. 472. Reference to the facts will show that this case involved a transportation business. It was admitted in the pleadings that the entire business of the corporation "* * * consists in the transportation of personal property, consisting of grain and other products, from ports outside of the State of New York to ports and places in the State of New York, and of personal property carried by the petitioner from ports in the State of New York to ports in other states, *and that its entire gross receipts from its business are derived from such transportation and not otherwise.* * * *"

The case is not, therefore, in point. The New York statute also exempted all business of an interstate character, and the New York courts treated this exemption as more liberal than that afforded by the interstate commerce clause itself. The prevailing opinion was concurred in solely on account of this exemption.

In any event, the case was decided upon the admitted fact that the corporation was an interstate carrier. The reasoning of this opinion assumes that the business of a separate corporation rendering services to such an interstate carrier would be taxable even though the business of the carrier itself is not taxable.

ASSUMING WORK PERFORMED BY A LONGSHOREMAN AND A SAILOR TO BE IDENTICAL, APPELLANT'S BUSINESS IS STILL TAXABLE

Counsel call attention to the fact that work which is performed by appellant's employees was originally performed by the crew of the vessel and still is performed

by the crew in cases where the master does not see fit to retain the services of contracting stevedores such as appellant.

But the similarity of the work in either case does not alter the fact that the contracting stevedore is engaged in the general stevedoring business, and that the ship master is not engaged in such business when unloading his own cargo.

It follows, therefore, that cases cited by appellant, such as *The Senator*, 21 Fed. 191; *Florez v. The Scotia*, 35 Fed. 916, and *The Main*, 51 Fed. 954, have no bearing on the question of whether an independent business is taxable. Those cases simply hold that one who makes a contract with the master of a vessel to perform services as a stevedore may proceed *in rem* against the vessel for his wages.

Nor does *International Stevedoring Co. v. Haverty*, 272 U. S. 50, deal with any other question than the remedy available to an injured longshoreman.

It was assumed in that case that the stevedoring company was engaged in a separate business, and it is apparent in the case at bar that appellant is engaged in a local business entirely distinct from the business conducted by the ship owner.

It is not, as the counsel argues, the place where the agent works which decides whether or not his operations are taxable, but the question is whether or not it is an independent business.

If, as in cases relied upon by counsel, a foreign transportation company had an agent transacting its business in the State of Washington, that agent would not be sub-

ject to a business tax for he has no business separate and apart from the business of his employer whom he represents.

But in the case at bar, the stevedoring company, unlike a ship's agent, cannot represent the carrier, it does no business *for* the carrier but does do business *with* it.

This being so and there being an independent local business, all courts recognize that a state tax, if otherwise valid, may be imposed upon that business.

STEVEDORING CONDUCTED AS AN INDEPENDENT BUSINESS IS NOT A COMPONENT PART OR LINK OF INTERSTATE COMMERCE.

Although appellant is not a carrier, receives no money for transportation services, but is engaged solely in the business of performing services for others, counsel seeks to argue that this independent business is a link or part of interstate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, which was an attempt by the legislature of Pennsylvania to tax a New Jersey corporation whose entire business consisted of operating an interstate ferry is relied on. The company's property, including its boats, had its situs in New Jersey. It simply leased a wharf in Pennsylvania for its own use in connection with the carrying of passengers and freight between the two states.

Had the ferry company, instead of operating its own wharf, engaged the services of a public wharfinger, the charges which might be made by the public wharfinger would be regulated by the state, and the business conducted by such public wharfinger would be taxable by the state.

Appellant's situation in the case at bar is analogous to the business of the public wharfinger, not to the business of the interstate carrier which operates its own wharf.

Again, appellant is organized under the laws of the State of Washington. It transacts its entire business within that state. It is governed, regulated, protected and taxed by that state without Federal intervention.

A state may grant a franchise for a boundary line ferry, and may exact a license fee from the ferry company. *Wiggins Ferry Co. v. St. Louis,* 107 U. S. 365, and the state may regulate the rates to be charged by such a ferry, at least where Congress has not intervened. *Port Richmond Ferry v. Hudson County,* 234 U. S. 317.

In this last cited case, the Supreme Court pointed out that a ferry operated in connection with a railway as a part of continuous interstate transportation would probably require a uniform system of regulation, *but that independent ferries established by state authority are local in their nature and are subject to local regulation.*

For a much stronger reason, appellant's business is entirely local and taxable by the state.

There can be no question as to the correctness of the decision in *Rhodes v. Iowa,* 170 U. S. 412. In that case a package was held to be in transit while stored in the depot of the carrier where it had been placed by the carrier's agent prior to delivery.

There was no question of an independent warehouse business, nor of any independent local business, nor indeed of the right to tax. The depot was owned by the

railway for its own purposes and was operated by its own employees.

The question in the case at bar is not whether the goods upon which the services are performed are in interstate or intrastate movement, but is simply whether or not appellant is engaged in an independent business of rendering services to others who may be engaged in interstate commerce.

The question in the case at bar is not whether an employee of appellant while working on a ship is engaged in work of a maritime nature, nor whether his remedy, if injured, would be under the Federal employers' liability act or the state act.

The only question is, does the imposition of a nondiscriminatory occupation tax on the proceeds realized from the business of supplying with laborers or their services to interstate commerce constitute a direct and forbidden burden on that commerce? Manifestly, it does not.

The liability of a local business to a business tax is not to be evaded by the fact that employees derive rights under Federal laws, or that instruments necessary in carrying on the business are licensed and regulated by Federal act.

Nor is the tax liability of a local business which renders services to interstate commerce to be determined by the taxability of the articles which are in transportation and in connection with which the services are rendered.

THE TAX IMPOSED, AS IT IS, ON ONE WHO CONTRACTS WITH A CARRIER, IS NOT ON THE CARRIER, AND IS NOT A FORBIDDEN BURDEN ON INTERSTATE COMMERCE.

The tax commission, in imposing the occupation tax on persons engaged in the business of performing services within the state to carriers under contract has made the correct distinction between local activities, which constitute a local business and are taxable, and activities of the same nature which, if conducted by a common carrier, would not constitute a separate local business and would not be taxable.

An occupation tax imposed upon the business of an independent contractor dealing with the Federal government would be valid. *Trinity Farms v. Grosjean*, 291 U. S. 466; *General Construction Co. v. Fisher*, 39 Pac. (2d) 358.

For a stronger reason the Washington tax, as imposed on an independent contractor doing business with a common carrier, is valid, for it is well understood that a certain amount of interference with interstate commerce by the states cannot be avoided, and that a state tax will be sustained unless it amounts to a direct and substantial regulation of or restraint upon interstate commerce.

Hump Hairpin Co. v. Emmerson, 258 U. S., at p. 294;

Gillespie v. Oklahoma, 257 U. S. 501.

A common carrier requires services of many local business concerns who are permanently engaged in business within this state. Proceeds realized from these businesses are taxable.

Among the services frequently required by carriers from local business establishments are repairing of vessels, piloting, wharfage, etc., and insuring, processing, storing, packing, and handling of the cargo.

It will be seen that the companies which render such services to interstate commerce are not themselves engaged in that commerce. For instance, companies engaged in the repair business pay this tax on proceeds realized from repairing vessels, although repairing of the vessel is necessary to the movement of the cargo. The company transacts a local business, and that business is taxable, notwithstanding the fact that the ship owner might have elected to repair the vessel himself, in which event there would be no local taxable business.

In *Hooper v. California,* 155 U. S. 655, and the cases following and sustaining it, it was held that the business of insuring interstate cargo, while necessary to interstate commerce, was not interstate commerce.

William v. Fears, 179 U. S. 270, is particularly in point inasmuch as plaintiff sometimes acts as an employment agent. The court held that labor agents, within the State of Georgia engaged in hiring persons to be employed outside of the state, were not engaged in interstate commerce.

The court also said that equal protection of the laws was not denied although the same tax was not imposed upon the business of hiring persons to labor within the state.

In this case the court pointed out the distinction between the case at bar and cases cited by plaintiff in which the interstate carrier itself is sought to be taxed.

In *United States v. Moore,* 275 Fed. 992, the payment of brokerage fees (on shipments secured through freight brokers) by steamship companies, was held not to be interstate or foreign commerce.

At page 995, the district judge said:

"* * * Brokerage, by whomsoever paid, is merely an aid or facility whereby shipment may be more easily and readily accomplished. It is in no sense interstate or foreign trade or commerce."

As an example of services rendered in processing goods which are in interstate commerce, we cite *Jorgensen-Bennett Mfg. Co. v. Knight,* S. W. (2d), at page 668.

In this case a state tax on earnings from kiln-drying and resurfacing lumber, shipped from points outside the state through the state on through bills of lading, was held not to be a tax on interstate commerce and was sustained as a tax on a local business. It was contended that the goods which were handled were in a continuous interstate movement from points outside of and to points outside of the State of Tennessee. The processing, or "remanufacturing," was necessary to diminish the weight of the lumber and fit it for final delivery in the shape in which it had been contracted to be delivered.

Nevertheless, the Supreme Court of Tennessee held that the business which was taxed was a local business and that it was immaterial that the lumber upon which the services were rendered was the subject of interstate commerce.

It may be argued that a tax on the local services rendered in the *Knight* case or in the case at bar would increase the cost of those services to the carrier. But all of the cases hold that this is not a forbidden burden. The

following language from *Erie Railroad v. Penn.*, 158 U. S., at page 439, aptly expresses the universal rule:

"It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

A much stronger case for taxability is *The Ponce Lighter Company v. Mun. of Ponce*, 19 Porto Rico 725. In that case the plaintiff was the owner of several lighters in the Port of Ponce which were used in loading and unloading steamers coming from the United States and foreign ports.

The City of Ponce levied a license tax on the exercising of plaintiff's business. Plaintiff so operated 23 lighters and was engaged in a local business, but, of course, he objected to the payment of the tax, claiming that his business had the character of interstate commerce and that he had already paid the property tax on the value of the lighters which he admitted would not be a burden on commerce.

The case was considered and on motion reconsidered. The opinion on reconsideration is exhaustive. All of the applicable United States court cases are cited and reviewed.

The court, in construing the municipal tax, said that it was its duty to sustain the constitutionality of the act unless it was proven to be contrary to the constitution

beyond all reasonable doubt and that any doubt should be settled in favor of the validity of the law.

The court pointed out in this case in effect that the lighterage company was in no sense a connecting character.

In the case at bar, of course, this is true. Appellant is not a carrier at all.

It must always be borne in mind that the state has power to prescribe rules for the licensing and governing of pilots, the collection of their fees, and other incidental matters in the nature of services to interstate commerce.

Cooley v. Board of Wardens, 53 U. S. 298;
Huus v. New York Steamship Co., 182 U. S. at 393;
State v. Ames, 47 Wash. 328.

The power to tax will be sustained whenever possible. The state retains the power to tax a business local in its nature, even though the Federal government may license and regulate that business under the commerce clause.

Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17.

In this case a warehouse licensed and regulated by the Federal government under the commerce clause was held to be doing a local, taxable business, even though an attempt was made by contract to make the warehouseman an agent of the carrier so as to avoid local taxation.

In *Larabee Flour Mills Company v. Missouri Pacific* (Ken.), 88 Pac. 72, it was held that the "switching" of cars loaded with freight to be thereafter transported to another state was a purely local business independently

contracted for under state control and was, therefore, under state control.

This was so, notwithstanding the fact that the Missouri Pacific was an interstate carrier. In respect to the switching, however, it was an independent contractor. The court said:

"Its work is that of switching cars. The service is purely local. *It is independently contracted for.* * * *. This being true, it is subject to state control. *Penn. R. R. Co. v. Knight,* 192 U. S. 21, and cases cited in the opinion." (Italics ours.)

The holding in this case follows *Chicago, Milwaukee & St. Paul Railway Company v. Becker,* 32 Fed. 849, where it was held that railroad service, known as "switching," was local and could be regulated by a commission appointed under a state act.

The case of *Penn. Railroad Co. v. Knight,* 192 U. S. 21, which has been so often cited, is one where the railroad company, an interstate carrier, maintained a cab service to and from its terminus in the City of New York.

By the company's regulations the use of the cabs was limited to persons either going to or coming from the State of New Jersey by the company's ferry. Nevertheless, the Supreme Court held that the cab service was essentially an independent local business and was subject to the control of the State of New York and that the railroad company was not exempt from payment of a state privilege tax simply because it was engaged in interstate commerce. The court held that a separation existed in fact between the local business and the interstate business and pointed out that the local business was "independently contracted for."

Even in the case of brokers who act as agents of transportation companies there may be an independent business. If there is, that independent business is taxable. *Ficklen v. Shelby County,* 145 U. S. 1.

There is no conflict between the *Ficklen* case and *McCall v. California,* 136 U. S. 104, and the cases which follow it, relied upon by appellant. In these cases there was no local business to be taxed. In the *Ficklen* case there was. In the case at bar, there is admittedly a local independent business further removed from interstate commerce, for appellant is in no way authorized to represent any transportation company for whom it renders services.

CONCLUSION

The challenged tax was properly sustained in view of the fact that appellant conducts a local business independent of interstate commerce, and appellant may not avoid liability by arguing that it does business with interstate carriers or by arguing that it renders services to goods in interstate commerce.

A sharp distinction exists between appellant's business, which consists of performing contracts to render services to interstate commerce, and the business of interstate commerce itself. An occupational tax on appellant's business is, therefore, not a tax on interstate commerce at all.

If it be argued that the imposition of such a tax would have an indirect effect on interstate commerce, it must be remembered that the cases point out that an indirect burden is not prohibited.

Moreover, the Supreme Court of the United States, in *Pacific Telephone & Telegraph Co. v. Tax Commission*, 56 Sup. Ct. 522, in sustaining this identical tax as imposed on the local business transacted by the telephone company, said:

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an ad valorem property tax upon tangible property used exclusively in such business."

Ad valorem taxes on property or carriers engaged in interstate commerce are not a prohibited burden.

The judgment of the court below should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 68.—October Term, 1937.

Puget Sound Stevedoring Company, Appellant, *vs.* The Tax Commission of the State of Washington and others, Appellees.	Appeal from the Supreme Court of the State of Washington.

[November 8, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

A tax laid upon the business of a stevedoring company, the amount to be measured by a percentage of the gross receipts, has been sustained against the protest of the taxpayer that an unlawful burden is imposed thereby upon interstate and foreign commerce. We are to determine whether the tax is valid either altogether or in part.

A statute of the state of Washington provides that for the privilege of engaging in business activities within the state a tax shall be payable by persons so engaged, payment to be made according to a designated measure. As to certain forms of business, as, for example, manufacturing and sales at retail or wholesale, the measure is a specially prescribed percentage of the value of the products or the gross receipts of sales. As to all other forms of business there is a general provision that the tax shall be equal to the gross income of the business multiplied by the rate of one half of one per cent. Washington Laws 1935, c. 180. This general provision is broad enough to cover the business of a stevedore.

Appellant, the Puget Sound Stevedoring Company, is a Washington corporation. It is engaged in the general stevedoring business at Seattle and at other ports on Puget Sound. At times it contracts with a shipowner or shipmaster to load or discharge a vessel through its own employees, controlling and directing the work itself. The great mass of its business, as we were informed upon the argument, is done in that way. At times, however, even though comparatively infrequently, it makes a different kind of contract

which changes essentially its relation to the ship. In this second form of contract it does not undertake to control, direct, or supervise the work. It "merely collects the longshoremen and supplies them to the vessel", advancing their pay at the completion of the job and "billing the ship and her owner the amount of the pay-roll plus a commission for services". All vessels served by the appellants are engaged exclusively in interstate or foreign commerce.

A suit by the taxpayer to enjoin the tax officials of the state from proceeding to collect the tax was dismissed by the trial court after a hearing upon bill and answer, the answer not disputing the allegations of the bill. The Supreme Court of Washington affirmed the dismissal, its judgment being placed upon the ground that the taxpayer was an independent contractor engaged in a local business. 189 Wash. 131; 63 Pac. (2d) 532. The case is here upon appeal. 28 U. S. C. § 344.

1. The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.

Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. "Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'." *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. *Baltimore & O. S. W. R. R. Co.* v. *Burtch*, 263 U. S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a "seaman." *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here.

What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. Cf. *Baltimore & O. S. W. R. R. Co.* v. *Burtch, supra.* True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ship's tackle. It took in the work of carriage to and from the "first place of rest", which means that it covered the space between the hold of the vessel and a convenient point of discharge upon the dock. Sometimes, though not, it seems, under appellant's contracts, the work in the hold is done by members of the crew, and the work upon the dock by employees of the dock company. Sometimes the cost is absorbed by the vessel and sometimes billed as an extra charge to shipper or consignee. The fact is stipulated, however, that no matter by whom the work is done or paid for, "stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the 'first place of rest', and vice versa." In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21, 26, where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being "contracted and paid for independently of any contract or payment for strictly interstate transportation."

The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling. *Philadelphia & Southern S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 341-342; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Galveston H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292; *Matson Navigation Co.* v. *State Board of Equalization,* 297 U. S. 441, 444; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 655. The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the

states. What is decisive is the nature of the act, not the person of the actor. An independent contractor undertaking to navigate a vessel would have the same protection as a pilot agreeing to navigate it himself.

2. The business of appellant, in so far as it consists of supplying longshoremen to shipowners or masters without directing or controlling the work of loading or unloading, is not interstate or foreign commerce, but rather a local business, and subject, like such business generally, to taxation by the state.

What is done by appellant in connection with activities of this order is similar in many aspects to the work of a ship's chandler, and even more closely similar to that of a labor or employment bureau. Such a bureau was considered in *Williams* v. *Fears*, 179 U. S. 270, 278, and its business found to be no part of interstate or foreign commerce, though the transactions of such commerce were increased thereby. Cf. *Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21, 22; *Chassaniol* v. *Greenwood*, 291 U. S. 584. Little analogy exists between the activities now in question and those reviewed in *McCall* v. *California*, 136 U. S. 104; *Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S. 150; and *Di Santo* v. *Pennsylvania*, 273 U. S. 34. The contractors there considered were found to be acting as agents of foreign steamship companies with authority to make contracts binding on the principals and even running in their names. If appellant stands in that relation to the vessels that it serves in this branch of its activities, it has failed to make the fact apparent by the allegations of its bill. The effect of such a showing is not before us now.

The decree of the Supreme Court of Washington being erroneous to the extent here indicated and no farther is modified accordingly, the cause being remanded for further proceedings not inconsistent with the opinion of this court.

It is so ordered.